THE SECOND PART Of the Faithfull COUNCELLOUR: OR, The Marrow of the Law in ENGLISH.

In which is handled more of the usefull and necessary heads of the COMMON LAW.

With an Alphabeticall Table of the most materiall Things therein contained.

By WIL: SHEPPARD, Esq;

LONDON,
Printed by *Tho: Roycroft*, for *Hen: Twyford*, *Tho: Brewster*, *Nath: Ekins*, and *J: Place*, and are to be sold in the *Middle Temple*, *Paul's* Church-yard, & *Furnivals Inne Gate* in *Holborn*, 1654.

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TO ALL MY LOVING COUNTRYMEN.

My Deare Friends,

I Have but this one word more to say to you, I have had lying by me for many years, some few rude Notes referring to many usefull heads of the Common Law, being of mine owne Collection, and for my own privat use: The which some having espied, would not rest till they had prevailed with mee, to make these common also; To satisfie their importunity, and because I was perswaded they might do some good, and could do no hurt: And finding my former Labours have had so good acceptance amongst you, I was drawn to make these publicke also. And in order thereunto I delivered my Papers (with this promise) That they should be first perused, corrected, & methodized by some able Man I not having time nor strength my self to do it,

but they are printed, and this is not so fully done as I could have wished: by which means, it is fallen out against my mind, that some few things are printed, as those which referre to Bishops and some others, which by reason of change of the times might have been left out, And instead of the name (King) *where that word is used, it should have beene the* Lord Protector, *&c.*

There are also some small faults in the method, But most of those, being understood, will be supplyed by the judicious Reader, having the help of an exact Table thereunto annexed, you must therefore now (since it cannot be avoyded) take it with all its faults in good part: For there are in it very many usefull and profitable things, and be assured, that whiles I live, I shall not faile, (next to the service of my God) to put forth my selfe to the utmost in all that I have or can do to serve my Country, and remaine.

Your loving Country man,
WILLIAM SHEPPARD.

ACCEPTANCE DEFINED.

Acceptance I.
- *Expresly of a Rent*
  - 1. *By Issue in tayle.*
  - 2. *By the Successor of a Spirituall person.*
  - 3. *By a Wife after her Husbands death.*
- *Implyed,*
  - 4. *By those in Remainder.*
  - 5. *By Heires.*
  - 6. *By an Infant of full age, or by an heir after his Ancestors death.*

Affirmances.
- *Of the same nature.*
- *Of another nature.*
- *Of the same thing at another time.*

Acceptance.

ACceptance is the taking in good part, or agreement unto some act done, or something given, which if he had not accepted of, and received, hee might have had and required some other thing, whereof he is now barred by Acceptance; or he might have avoyded some thing done, which hee hath now affirmed by this: And this is of a Rent, and that is expresse or implyed, and it is sometimes of a Rent by an issue in tayle, after his Ancestors death,

or by the Successor of a spiritual person, after the death or departure of his Predecessor, or by a Wife after her Husbands death, or by him in Remainder, or by an Infant at his full age, or by an heir after his Ancestors death, or it may be by the party himself that had the Estate, and sometimes it is of a sum of money or other thing, either of the same nature or of another nature; And by the taking of the Rent in such cases, the party that accepteth it is barred for his time to take any advantage of the Estate of him of whom he took the Rent that was before voydable, and might by him have been avoyded before the Acceptance of the Rent, but is now by this means affirmed: And in other cases by such Acceptance he is estopped to do or have something that before he might have done or had. As appeareth in the examples following. *Terms Ley. Dyer* 46. 9.

3. Where and in what case the acceptance of the Rent is a bar.

Wheresoever the Acceptance of a Rent by any, shall bar him that doth accept and affirm the Estate of him from whom it is accepted, there must be these conditions and qualities in the Case: There must be a privity either in Deed or in Law, between the party giving, and the party taking; and therefore if a Disseisin of any Issue, &c. accept a Rent, this shall not prejudice an Issue. 2. There must continue in the Taker a power of Acceptance to, and at the time he must have the next Estate; and therefore if the Issue in tail before his acceptance have suffered a Recovery of his Reversion, and after accept the Rent, this will not affirm the Lease against the Recoveror. 3. The Lease on which the Rent accepted is reserved, must be a good Lease, and not void or determined by Re-entry; And therefore if a Lease be on condition for years, that such an Act be not done, the Estate shall cease and become void, no acceptance of the Rent reserved upon that Lease after, will affirm the Lease. 4. The Lease must begin in the life time of him that made it. 5. If there be any precedent Lease, the Acceptance must be after the end of that Lease, and therefore if one seised in Fee, make a Lease for ten yeers, rendring Rent, and after make him an Estate-tail, or to him and his wife, and then make another Lease, or himself and his wife of her Land to the same party, and the Issue, or Wife after his

death accept the Rent every ten yeers, this doth not affirm the second Lease. 6. The Acceptance of the Rent must be by one that hath right to the Land at the time, and not before his Right come; And therefore if the Issue in tail before his Ancestors death accept the Rent, this is no bar to him after. 7. The accepted thing must be a Rent, and not a sum in gross, or an Annuity newly created: And therefore if one make an Estate, and therein the Feoffee, Lessee, or Donee, covenant to pay to the Feoffor, Donor, or Lessor a sum of money yeerly, or grant to him a new Annuity or Rent out of the Land, and the Issue, Successor, &c. accept this, this is no Bar nor affirmance of the Lease. 8. The Lease on which the Rent is reserved must be by Indenture. *Bro.* 166. *Dyer* 46. 9. 11 *H.* 4. 13. 14 *H.* 8. 11. *Dyer Cro.* 3. 64. *& Suphil* 214. *Dyer* 27. *Bro.* 399. 879. *Co.* 3. 64. 26 *H.* 1. 2 *Brod. Acceptans* 2. *Dyer* 91. 13.

By Issue in taile or his Feoffee.

If a Tenant in tail make a Lease for yeers, rendring Rent, and dye, and his Issue accept the Rent; this doth bar that Issue, that he cannot avoid the Lease, and doth affirm the Lease for his time. And if such a Lessee for yeers, make a Lease of part of the Land for all the Tearm, and the Issue accept the Rent of the Lessee or Assignee; this is an affirmance of the lease for so much of the Land as the Lessee, or Assignee hath, and for the residue. 21 *H.* 7. 38. *Dyer* 30. & 95. *Bro.* 166. *Co.* 3. *Mallory's* case 23.

If there be Tenant for life, the Remainder in tail, and he in Remainder make a Lease for yeers, rendring Rent, after the Tenant for life dyeth, and then the Tenant in tail dyeth, and after his death the Issue in tail accept the Rent the next Rent day; this doth bar the Issue and affirm the Lease. *Dyer* 279.

If Tenant in tail make a Lease for forty yeers, to begin ten yeers after, rendring Rent, and dye, and the Issue in tail enter, and make a Feoffment before the ten yeers expire, and at the ten years end the Feoffee wave the Possession, and the Lessee enter and pay the Rent at one of the dayes of payment, and the Feoffee accept it, this hath affirmed his Lease. *Plow.* 437. *Co. super Litt.* 46. 6.

2. By the successor of a spiritual person.

If a Bishop, Abbot, Dean, or Prebend, by their common Seal make a Lease for years, rendring Rent, and dye, and the Successor accept the Rent, this doth affirm the Lease for his time. *Dyer* 46. 309. *Co.* 3. 65. 2 *H.* 7. 38. 37 *H.* 6. 34. *Brow.* 380. 322.

3. By a Wife after her Husbands death.

If a Husband and Wife make a Feoffment in Fee, Gift in tail, or Lease for life, or years, of the Land of his Wife, rendring Rent, and dye, and after his death, the Wife take the Rent, this express Acceptance doth affirm the Estate, and bar the Wife and her Heirs of Entry and Action both for ever: And if she distrain and avow for the Rent, or bring an Action of Waste against such a Lessee, this is an implyed Acceptance, and will bar her and hers also. So if the Husband and Wife make a Lease by Indenture, rendring Rent, and the Husband before Rent-day dye, and the Wife before the day take another Husband, who at the day doth accept the Rent, and then dyes, this acceptance by her Husband is her acceptance, and will bar her for ever. 26 *H.* 8. 2. 15 *Ed.* 4. 18. *Dyer* 46. *F. N. B.* 192. 3 *H.* 6. 53. *Brow.* Lease 3. 11. *Dyer* 159.

4. Of the Lord of a Manor, or he in Remainder or Reversion.

If a Lord of a Mannor grant a Copyhold Estate for three lives, and after make a Lease for three lives, rendring a Rent, and give livery of Seisin, and so disseise the Copy-holder, and after the Lord granteth the Fee to the Copy-holder, and he accept the Rent of the Tenant for life, this doth affirm the Lease. *Dyer* 30. 207.

If a Disseisor make a Lease for life, rendring Rent, and after grant by Fine the Reversion to the Disseisee, and he accept the Rent of the Lessee, it seems this is a bar. *Dyer* 30. 207.

If one make a Lease for years (if the close of the Condition be not, That then the Estate for years shall cease or be void) rendring Rent, with clause of Re-entry, for non-payment, and after non-payment and a legall Demand made, the Lessor doth accept the Rent at another day of payment; this doth bar the Re-entry, and affirm the Lease: And if it be an Estate for life, or any Fee-hold that is granted, rendring Rent, let the close of the Condition be how it will, untill an actuall Entry, acceptance of the Rent will bar the Lessor and

affirm

affirm the Lease, or Feoffment, *Coo.3.64. Coo.super Lit.211.*

If a Tenant make a Feoffment by Collusion, and the Lord dye, and his Heir accept the Services of the Tenant, by this he is barred to take advantage of the Collusion. *F. N. B.* 142.a. *5. By an Heir.*

If a man seised of Land in the right of his Wife, make a Lease for years, not warranted by the Statute of 32 *H.* 8. rendring Rent, and after their death the Heir accept the Rent; now it seems by this he hath affirmed the Lease. *Dyer* 279. *6. By an Infant comming to ful age.*

If an Infant make a Lease for yeers, rendring Rent, and at his full age accept the Rent, by this he hath affirmed the Lease, and barred himself: And if it be a Lease for years, the Remainder for years to a stranger, rendring Rent, and he accept the Rent of the first Lessee, this doth affirm it for the Remainder also: So it seems if he accept the performance of other Covenants, this may affirm the Lease. And so it is of Copyhold Land; if an Infant Copy-holder make a Lease for years, rendring Rent, and at his full age accept the Rent, this shall bind him. *Trin* 2. *Cor.B.R. Ashfields* Case. *Plow.* 545. 18 *Ed.* 4, 14 *H.*8.

If Lands be given to the Husband and Wife, and the Heirs of the body of the Husband, and he lease for years, rendring Rent, and dye, and the Issue in tail accept the Rent, during the life of the Woman; this is no bar nor affirmance of the Lease. *Coo.*3.64. *Broo. Acceptance.* *3. Where and in what case it barreth not.*

If the Tenant in tail make a Lease for twenty years, rendring Rent, and the Lessee make a Lease of the Land for ten years, and the Tenant in tail dye, and his Issue accept the Rent of the second Lessee; this is no bar to the Issue, nor affirmance of the first or second Lease; But if the first Lessee pay it is good; so also if the second Lessee pay it as Bayliff to the first Lessee. *Broo.* 166. *1. By Issue in tail, or his Feoffment.*

If the Tenant in tail make a Lease for years, not warranted by 32 *H.*8. as if he make a Lease to begin after his death, rendring Rent, and the Issue accept the Rent, yet this doth not bar him. *Dyer* 279.

If a Parson, Vicar, or Prebend make a Lease for years, rendring Rent, and the Successor accept the Rent, this is no bar to him, nor affirmance of the Lease: So if that a Bishop makes a Lease *2. By the Successor a spirituall person.*

a Leaſe for Tithes or the like, or any other void Leaſe, and his Succeſſor accept the Rent, yet this will not bind. *Co.* 3. 65. *Dyer* 46. 327 *H.* 6. 34. *Broo.* 38. 321.

If a Biſhop make a voydable Leaſe to one, and after make a good Leaſe, confirmed by the Dean and Chapter to another, and the Succeſſor accept the Rent upon the firſt Leaſe, this will not affirm this firſt Leaſe. *Dyer* 46. 9.

If a Biſhop make a voydable Leaſe, and dye, and his Succeſſor accept the Rent onely due to the King, in the time of the Vacation of the Biſhoprick; it ſeems this is no affirmation of the Leaſe. *Sed quere* of this Caſe. *Hill.* 18. *Jac. R. R.*

3. By a woman after her Husbands death.

If the Husband alone make a Feoffment in Fee, Gift in tail, or Leaſe for life or years, rendring Rent, and dye, and the Wife accept the Rent, this doth not bar the Wife nor her heirs, nor affirm the Leaſe: So if the Husband alone make a Leaſe for life, rendring Rent, with a Letter of Attorny to his Wife to give livery, and ſhe doth ſo (as it ſeems ſhe may) and after his deceaſe ſhe accept the Rent, this is no bar. 26. *H.* 8. 2. 15 *Ed.* 4. 18. *Perk. ſed* 199.

If Husband and Wife had at the Common Law before the Statute of 32 *H.* 8. made a Leaſe for yeers by parol, rendring Rent to them, and the Husband had dyed, and the Wife had accepted the Rent, yet ſhe might have avoyded the Leaſe, unleſs it were by Indenture. *Dyer.* 91. *b.*

If Husband and Wife by Indenture enfeoffs *A.* of the Land of the Wife, and *A.* in the ſame Indenture covenants and grants to pay to them yearly, during their lives forty ſhillings, the Husband dyeth, the Wife accepts the Rent, this ſhall not bar the Wife. 26 *H.* 8. 2. *a.*

If the Husband and Wife make a Leaſe by Paroll, rendring Rent, and ſhe accept the Rent after his death, this will not bar her. *Plow.* 431. *per Bromley.*

4. By Lord of a Mannor, or by him in Remainder or Reverſion.

If one have Title to have a writ of Eſcheat, & he after accept the Rent of the Tenant, he is not barred of this advantage: For if the Lord accept the Rent by the hands of the heir, or Feoffee of the Diſſeiſor, that is in upon a title of Diſcent or Feoffment, after the Eſcheat accrued, this is no bar; but if he avow for the Rent in a Court of Record, or accept Homage, or Fealty,

Fealty of the Tenant, that is in by Diſſeiſin, by this he is barred. *Cook ſuper Litt.* 268.

If a Leaſe be made upon a collaterall Condition, a Condition to do ſome collaterall thing, as not to alien, or the like; and after the Condition broken, he in reverſion, not having notice thereof doth accept the Rent, this is no bar, nor affirmance of the Leaſe. *Co.*3.64.

If Tenant in tail be the Remainder in tail; and the firſt Tenant in tail make a Leaſe for years, rendring Rent, and dye without Iſſue, and he in Remainder accept the Rent, this is no bar. *Ceſſante ſtatu primitivo, ceſſat derivativus.* (The primative Eſtate ceaſing, the derivative alſo ceaſeth.) *Broo.*370.

If a Copy-holder makes waſte, by which a Forfeiture accrues to the Lord, and afterwards the Lord accepts the Rent, this ſhall not conclude him of his Entry by *Cook*, becauſe by the forfeiture the Eſtate was meerly void. *H.*28.*Q.* And yet ſee the Caſe, if a Copy-holder enfeoff a ſtranger to his own uſe by livery in fee, and after pay the Rent to the Lord as before, this is a continuance of the Eſtate. *Arden & Banmorts* Caſe in *Crompt. Jur. f.*214.*b.*

5. *By an Heir.*

If one make a Leaſe at will, and dye, and after his death the Heir accept the Rent, this doth not bar him, nor affim the Eſtate: For acceptance cannot make good a Leaſe determined by the Leſſors death, no more then a Leaſe determined by Entry, 14.*H.*8.11.

If Leſſee for life, or Tenant in Dower make a Leaſe for years, rendring Rent and dye, and the Heir accept the Rent; this is no bar to the Heir. 2 *H.* 4, 5. 11 *H.*4.15.

4. *Where and in what caſe the acceptance of another thing is a bar, and where not.*

If the Husband and Wife make a partition of his Wives Land, and it be not equall, and he dye, and after his death ſhe doth enter into and agree to that unequall part; this will affirm the partition, and bind her for ever. 2 *Ed.* 3. *Cui in vita* 17. *Co. ſuper Lit.*170.

If the Husband be ſeiſed of three Mannors of equall value, and chargeth one of them with a Rent, and dyeth, and ſhe accept this Mannor charged for her Dower, in this caſe ſhe is barred, and muſt hold the Mannor charged with the Rent; but

but if ſhe had taken the proviſion the Law made by writ of Dower, there ſhe ſhall have a third part of all diſcharged: *Coo. ſuper Lit.* 173. 18 *H.* 6. 27. 26 *Ed.* 3. *Dower* 133.

1. *To a woman after her husbands death.*

If a Woman accept of a Rent, or other Land, or part of the ſame Land whereof ſhe is to be Endowed, or a Jointure made to her after marriage, by theſe means ſhe may be barred of her Dower; For which ſee more in Dower. *Dyer* 266. 317. *Coo.* 4. 25, 26. 7. 40.

2. *To a Feoffor, Leſſor, &c.*

If one make a Feoffment or Leaſe, on condition that the Feoffee or Leſſee ſhall do ſome Act, as make a Leaſe for life, or the like, to the Feoffor or Leſſor, and he do ſome other thing, as make a Leaſe for years, or the like, and the other accept it; now by this he is barred to take any advantage for the breach of the Condition; But if the Act to be done were to a ſtranger, and he accept another thing for it. *Contra*, it is otherwiſe. *Coo.* 3. 64.

3. *To an Infant.*

If an Infant that is a Parcenor make a diviſion, and it be unequall, and at her full age ſhe accept of it, and enter upon the part allotted her, by this ſhe hath affirmed the partition, and barred her ſelf. *Coo. ſuper Lit. & Lit.* 4. 171.

4. *To the Lord of a Mannor.*

If there be Lord and Tenant enfeoft his Heir within age, or a ſtranger, and the Lord receive Homage of the Heir, or accept the Services of the Feoffee, and after the Father dye; now in this caſe he is barred of the Wardſhip by his acceptance, and cannot aver the Colluſion. *F. N. B.* 142. *Fi. Gard* 33. *Bro.* 121.

5. *To an Obligee.*

If one be bound in an Obligation with Condition, that the Obligor or a ſtranger, ſhall pay to the Obligee a ſum of money at a day and place certain, and the Obligor or ſtranger pay, and the Obligee accept a leſs ſum before the day at any place, or at the time in any other place then the place appointed, or the Obligor or ſtranger give, and Obligee accept any other thing, as a Horſe, or the like, in recompence, in ſatisfaction, be it before, or at the day; by this he is barred to take any advantage upon the Obligation; and this is held to be a good performance of the Condition: But the giving and taking of a leſs ſum for a greater, at the time and place of payment; nor the giving of a Horſe, or the like, if it be by a ſtranger

ger to the Condition; and the Acceptance by the obligee, in in this case is no barre to the obligee, nor performance of the Condition. So if a Condition be to make an estate of twenty pounds *per Annum*, or to deliver twenty Quarters of Corne, and he make an estate of ten pound *per Annum*: or deliver ten quarters of Corne, and the obligee, accept this at the time and place of delivery, it seemes this is no barre, (But if the obligee make a Deed of Receipt of lesse; this by way of Release may be a barre.) And if a Condition of an obligation be, to do any collatterall thing, as to accoune, make a Feoffment, or Lease, or grant a Rent, or the like, the giving and taking of money or any other thing in recompence and satisfaction will not barre. And if the Condition of the obligation be to pay money to a stranger, and the Obligor give, and stranger accept, a horse, or other thing in recompence, yet this is no barre to the obligee no good performance of the Condition; And if it be to pay money to the party himselfe, and he give, and the obligee accept a horse or the like, in satisfaction of part of the debt, and say not for what part, this is void for incertainty. *Perk. Sect.* 751. 753. *Cook* 5. 117. *Dyer.* 1. *Brow. Acceptans. Dett.* 43. *Coo. supra Lit.* 212. 213. *Dyer.* 50, *Perk.* 749. 752. *Coo.* 9 78. *Coo.* 4. 3. The gift & Acceptance of a horse or other thing in satisfaction of a Judgement, is no barre in a *Scire facias* upon the said Judgement. *Trin.* 9. *Iac. Adi. &c.*

upon a Judgement.

What is Advowson or Patronage?

It is the Revertion of a spirituall living, or the Right that a man hath to present or collate a Clark to the Ordinary for a Church Parsonage, a spirituall Benefice, as Parsonage, Vicaridge, Prebend, or Chappell when it becometh void. And he that hath this right is called *Avan*, or *Advocatus*, and hence the Advowson is called his *Patronatus*, and sometimes, the Patron. (1) him that hath the gift of the Benefice, or him that hath the Advowson of a Parsonage, Vicarage, free Chappell, or other spirituall promotion, because anciently he did much for the maintenance and support of these Churches. *Advocatus est ad quem pertinet jus Advocationis alicujus Ecclesiæ, ut Ecclesiam nomine proprio non alieno possit presentare. Termes of Law, Coo. supra Litt.* 17. *b.* 119. *b. F. N. B.* 32.

What is a Patron?

How many so'd advowsons are

This is either Appendant (1) incident and belonging to some

mannor or other land. Or engroſſe (*i*) when one hath an Advowſon alone, and not by reaſon of any other thing. If it be incident to a Mannor, it is incident to the Demeſnes, and not the Rents and ſervices of the Mannor which are ſubject to extinguiſhment, for it cannot be made appendant to them. *Dyer.* 706.

This right of preſenting to the Church was firſt gained by ſuch as were founders of the Church, either *ratione ſoli*, where he gave the ſoile, whereupon it was built: or *ratione fundationis*, where he founded and built the Church, or *ratione Donationis*, by reaſon that he endowed it with all the revenew, and was a benefactor to, or maintainer of it, or did increaſe it. *Co. ſuper Litt.* 119. *b.* 17. *b.* 13. *H.* 4. 1.

But note, that every Church is not preſentative, or collative, but ſome are elective, and ſome are donative. *Cook ſuper Litt.* 119.

The nature thereof.

An Advowſon, whether incident or ingroſſe is a lay tenement that lieth in Tenure, and may be granted by Deed, or deviſed by Will, in Fee, for life or years: But it cannot paſſe without Deed, unleſſe it be in ſome ſpeciall caſe of Partition &c. or as incident to a mannor by grant of the mannor, neither will it paſſe by livery. And if it deſcend to an heire, it ſhall be accounted Aſſetts for ſo much as it is, but the Law doth value it at a very low rate. *Co.* 5. 56. & *ſuper Litt.* 85. 332. *Co.* 7. 2. 374. *b.*

Note that an Advowſon at one turne may be appendant, and at another turne in groſſe, as if the mannor be divided between Coparceners, and every one hath a part of the mannor without ſaying any thing of the Advowſon appendant, the Advowſon remaines in Copercenary, and yet in every of their turnes it is appendant to the part which they have, and ſo it is if they make compoſition to preſent againſt common right, yet it remaines appendant, but if upon ſuch a Partition an expreſſe exception be made of the Advowſon, then it remaines in Copercenary and in groſſe. *Co. Juper Litt.* 122. *a.* *Dyer.* 259. 2. *H.* 7. 5.

A man may have the Advowſon of the moity of a Church which is called *Advocatio medietatis Eccleſiæ*, as, where there be

be severall Patrons, and two severall Incumbents in one Church, the one of the one moity thereof, the other of the other moity thereof, and one part as wel of the Church as of the Towne allocted to one, and the other part thereof to the other, in this case each Patron if he be disturbed may have his *Quare impedit*. But if there be two Coperceners and they do agree to present by turne, each of them in truth hath but a moity of the Church, and if either of them be disturbed he shall have a *Quare impedit*, but if one of them sue a Writ of right of Advowson, it must be *de medietate Advocationis*. But where there be two Patrons and two Incumbents in one Church as before, each of them may have a Writ of Right *de Advocatione medietatis*. *Co. super Litt.* 17. 18.

Parson. He that is thus presented to a Benefice or a Parsonage by the Patron is called a Parson, who is defined to be in a legall signification, the Rector of a Church parochiall, who sometimes is called the *Rector* of the Church And a *Rector* is defined to be him that hath the charge or cure of any Parish church who it seems hath as much right in his parochiall Church, as the Prelate hath in his collegiate church. But this word (as it seemes) is more specially apropriated to one that hath a Parsonage in that place, where there is a Vicaradge endowed. And that he is most properly called *Persona* that hath a Parsonage without a Vicarage. *Co. super Lit.* 300. *a. b.*

Rector.

Parson Imparsonee. or. Incumbent. And he is called *Persona Ecclesiæ, quia vicem gerit Ecclesiæ*, to sue for and defend her right, and to be sued by one that hath better right, and is said to be seised *Jure Ecclesiæ*. And both he and him that hath a Church impropriate when they are in possession are called *Parson imparsonee*, or Incumbent, both which words do import the same thing (*i*) one that is presented, instituted, and inducted, and is sate downe in possession of any Parsonage, Vicarage, or other spirituall promotion, whether appropriated or not. For in the case of Presentment he is not compleat Incumbent untill Induction. *Co. super Litt.* 119. *Dyer* 121. *Plow.* 496. 497. *Co.* 11. 10.

Vicar. But if the Benefice to which a man is so presented be called a Vicarage, then he that is presented is called a Vicar, because *vicem alterius gerit sive obtinet, & in ejus locum succedit*, for

these began with disapropriations, when Advowsons were appointed to Prioresses, Deanes and Chapters, and the like, that could not feed the peoples Bowles, which was at first allowed under pretence of increase of hospitality, and then these were appointed and substitute under them for this purpose, to say prayers minister the Sacraments, &c. to the people of which see Appropriations, so that a Vicar is one that hath a Spirituall promotion or living which is called a Vicarage. For in the first case, such a spirituall living is called a Rectorie, Parsonage or Benefice, and in Latine *Ecclesia*, and in the last a Vicarage, in Latine *Vicaria*, which is said to be a certaine portion of a Parsonage to be allowed to the Minister for his maintenance, so that the Vicarage is derived out of the Parsonage. And this portion was first appointed, And hath been since called an Indowment, and sometimes a Composition. (see Composition.) *F.N.B.* 32. *Gistat* 15. *R.* 2. *cap.* 6.

Rectory Parsonage or Benefice.

Vicarage.

Indowment.

No licence shall be granted for any appropriation of any Parish Church in Chancery, but that there shall be therein expressed that the Diocesan of the place upon the appropriation shall ordaine according to the valew of the Church a convenient summe of money to be payd yeerly of the fruits and profits of the Church by those that will have the same Churches in proper use, and their successors to the poore of the Parish for help of their living for ever, and that the Vicar be well and sufficiently endowed. *Stat.* 15. *R.* 2. *cap.* 6.

Donative.

It is a Benefice meerly given and collated by the Patron to a man, without presentation to, or Institution by, the Ordinary or Induction by his commandement. And thus were all the Bishoppricks anciently being of the Kings foundation donative, and given by the King, *per traditionem baculi et annuli*, but now by the Kings grace they are become elegible by their Chapter. And thus may a parochiall Church be at this day. *F.N.B.* 35. *E. Act* 8. *Re. cap.* 4. *Co.* 3. 76. *et supra Litt.* 344. *a*, *Termes of the Law* 159.

The nature thereof.

The King of himselfe may create Donatives and found a free Chappell and exempt it from the jurisdiction of the Diocesan. And he may at this day by his letters Patents give licence to a common person to found such a Chappell, Church, Prebend

Prebend, or Chanterie, and so ordaine, that it shall be donative and exempt from all ordinary jurisdiction. But the Patron may not present a Lay man, but must present a Clark.

A Benefice donative by the Patron only is a lay thing; and not presentable, and the Bishop may not visit, medle with, or deprive such a Chaplaine, but the Patron may visit by Commissioners apointed by him and may put him in or out at his pleasure without any help of the Bishop at all, and he may resigne to the Patron and not to the Ordinary. And if the Bishop do meddle with him, he will fall into a premunire, as *Barlow* the Bishop in *Ed. 6.* time did for depriving the Deane of *Westminster*, which was a Donative. If the Incumbent be disturbed, the Patron may have a *Quare impedit.* No lapse shall acrew unto the ordinary except it be so specially provided in the foundation. *Brow. premunire 21. Cromp. Jur. 97. Oyer 27 Co. super Litt.* 344.

If the King doth found a Church, Hospitall, or free Chappell donative, he may exempt the same from ordinary jurisdiction, and then his Chancelor shall visit the same. And if the King do found the same without any speciall exemption, the Ordinarie is not, but the Kings Chancellor to visit the same. *Co. super Litt.* 344.

But if the Patron of such a Church, Chanterie, Chappell &c. Donative, doth once present to the Ordinary, and his Clark is admitted and instituted, it is now becom presentable, and shall never be donative after, and then lapse shall incurre to the Ordinary, as it shall of other Benefices presentable. But a presentation by a stranger to such a donative and institution and induction thereupon is meerely void. *Hill. 1. Jac. coram Reg. Co. super Litt.* 344. *Fitz. N.B.* 35. *E.*

This word is used sometimes for Presentation. But most commonly and properly, the Collation of a Benefice signifieth the bestowing of a Benefice by the Bishop that hath it in his owne gift or Patronage, whether he hath it by the lapse, or *Jure Patronatus*. And this differeth from Institution in this, that Institution into a Benefice is performed by the Bishop, at the motion or presentation of another, who is Patron of the same *Collation.*

same, or hath the Patrons right for the time, but this is done by the Bishop upon his owne right. *Termes of the Law.*

Nomination. It is the power that one hath in the right of his Mannor or otherwise to name a Clerk to another man for a Parsonage or spirituall promotion; and then he to whom he is nominated must present him to the Ordinary. And if he be disturbed in this, he may have relief by *Quare impedit. Termes of the Law. Dyer* 327. *F.N.B.* 33. *b.*

Presentation or Presentment. It is the Act of the Patron offering his Clerk to the Bishop of that Diocesse to be instituted to such a Church in these or the like words directed to the Bishop. *Presento vobis A. B. Clericum meum ad Ecclesiam de Dale, &c.* (*i.e.*) I doe present my Clerk to the church of Dale: And this may be either by Word or by writing, if it be by writing, it is no Deed, but in the nature of a Letter to the Bishop. And upon this the Bishop is to allow and institute the Clerk presented, unlesse he can shew good cause to the contrary, or else the Patron may have a *Quare Impedit* against him. There is a Presentation also to Chappels, Hospitalls, Deaneryes, Prebends, and the like: And was to Abbeys and Chaunteries, and such like whiles they stood. And he that hath this power hath 6 moneths time to make his presentment after the Church doth become void. He that hath any estate in the Mannor or Land to which the Advowson is appendant: or that hath the Advowson in grosse, in Fee simple, taile for life, or yeers, shall present if the Church become void during his estate: or if such a man grant his next Advowson, or next Presentation, his grantee shall have it. *Coo. super Litt.* 120. *Termes of Law. Coo. super Litt.* 120 *Plow.* 500. *Fitz. N.B.* 32. 33. *Dott. & Stu. lib.* 2. *chap.* 31. *Coo.* 8. 145.

The nature of it. It is a temporall Inheritance, &c. See Dott & Stu. f. 111. *lib.* 2 *cap.* 26. *put it in here.*

Who shall have the presentation to a Parsonage Vicarage, &c. and who not.

The King shall present to Advowsons, where he hath the temporalties during vacancy of the Bishopricks; so where he hath a wardship or custody.

If a Bishop have an Advowson and the Church become void and the Bishop die, the King, not the successor nor executor of the Bishop shall have the presentation: But if the tenure be of a common person by Knights service, and the Church become void, and the tenant die, the Executor, not the Lord, shall

shall have the presentment. *F. N. B.* 32. *F. Cus. super Litt.* f. 90. *F. N. B.* 33.

If Joint-tenants have a presentation, they must agree together and present, and if they do not agree in Six moneths, the Bishop shall present by the Lapse. And if one of them present without the other, or they present severally, the Ordinaris may, or may refuse to admit such a Presentee: So also Tenants in common, and Parceners must agree to present by turne. *Dyer* 29. p. 194. 30. p. 51. 2 & 3 p. 20.

If a Feme covert be seised of an Advowson, and the Church becometh void, and the wife dieth, the Husband shall present to the Advowson. *Cus. super Litt.* 120.

If a Vicaradge become void, and before that the Parson can present, he is made Bishop, &c. yet he shall have this Presentation. *F. N. B.* 34. *N.*

If an Infant have a Mannor by descent, to which an Advowson is appendant, and suffer a usurpation to the Advowson, and after at his full age doth grant the mannor in Fee, and after the Advowson become void, the Infant, and not the Feoffee of the Mannor shall present. *F. N. B.* 34. *x.*

If two Sisters have an Advowson by descent, and the Church become void, the elder Sister shall present, and so shall her Husband if shee dye, and he be tenant by the Curtesie. *F. N. B.* 33. *M.*

If a man be seised of an Advowson in Fee simple or Fee taile in grosse or appendant to a Mannor, and it happen to be void, and he dye, his Executors, and not his Heire or Issue in taile shall have the Presentment. *F. N. B.* 33. p. 34. *c. b.*

If a woman be assigned the third part of a Mannor to which an Advowson is appendant in Dower, shee shall have the third presentation.

If the King have an Advowson in Fee, and it happen to be void, and during the Avoidance, he grant the Advowson in Fee, the Grantee not the King shall present to this avoidance. But if he have an Advowson by reason of the Temporalties of a Bishoprick, which is void, and during the vacancy the King doth restore to the Bishop the Temporalties, yet the King, not the Bishop shall have this presentment. *F. N. B. N.* 33.

After Livery tendered by the heire of the Kings tenant, the heir may present to a Church becoming void after tender. Adjudge Curia Wardor Ed. Hambdens case M. 3. Executors.

After the avoidance of a Church by Simony, the King shall present that turne, if the presentment were by right. Stat. 31. Eliz. cap. 6.

So when an Ecclesasticall person is made Bishop. Vide infra. Cession et Simony.

If the King have an Advowſon by reaſon of his Wardſhip, and it happen to be void, and then the Heire ſue Livery out of the Kings hands, in this caſe the King, not the heir, ſhall have the Preſentation. *F. N. B.* 33. o.

If the tenant of the King have title to preſent to an Advowſon which is void, and the ſix moneths paſſe, and after the Kings tenant dye before the Biſhop preſent by the Lapſe, and his heire within age, and in ward to the King, now the King by reaſon of his Wardſhip, and not the Biſhop by reaſon of the Lapſe ſhall preſent. *F. N. B.* 35. *a.*

If the Patron be outlawed in Treſpaſſe, and the Church become void, the King ſhall have this Preſentment by reaſon of the Outlawrie. *F. N. B.* 34. *R.*

If the Advowſon of an Hoſpitall, &c. be appendant to a Mannor, and the Hoſpitall be void, and being void, the King grant the Mannor and all Advowſons with the appurtenances; now by this the preſent preſentment doth not paſſe, neither may the Grantee preſent, but given up, the King may preſent. See more in *Grants*. *Dyer*. 300. *p.* 36. *F. N. B.* 33. *N.*

If a tenant in tail of a Mannor to which an Advowſon is appendant diſcontinue the Mannor in Fee with the Advowſon, and after the diſcontinued grant the Advowſon to another in fee and after doth reinfeoffe the tenant in taile of the Mannor, and he dyeth ſeiſed of the Mannor: now his heire ſhall preſent when it doth become void. *F. N. B.* 35. *b.*

If one have a Mannor to which an Advowſon is appendant as Gardein in Socage, and the Church become void, the heire and not the Gardein ſhall preſent. *F. N. B.* 33. *f.*

If I have a Leaſe for yeares, or *per antea vir* of a Mannor to which an Advowſon is appendant, or of an Advowſon in groſſe, and the church become void, and then my Leaſe doth end: In this caſe I or my Executors ſhall have this Preſentation, not he that hath the Reverſion. *F. N. B.* 34. *B. Perk. Sect.* 97.

If a man be diſſeiſed of a Mannor to which an Advowſon is appendant, and the diſſeiſor ſuffer a uſurpation by a ſtranger to the Advowſon, and after the diſſeiſed enter into the mannor, he ſhall preſent notwithſtanding this uſurpation. *F. N. B.* 36. *F.*

If

If the elder ſonne by the firſt venter preſente and dye without heir, and after the Church become void, the puiſne ſonne by the ſecond venter ſhall not have this Advowſon nor preſent: but if a man have two Daughters by divers venters, and they enter and make Partition to preſent by Turne, and the one dye without heire, the other ſhall have it: But after the Partition if the one Siſter have preſent, and after dye without heire of her, it ſeemes the Siſter of the halfe blood ſhall not have it. And ſo generally whoſoever may bring a *Quare Impedit* for a diſturbance in a Preſentment ſhall have the Preſentment, and may preſent. See therefore *Quare impedit infra. F.N.B.* 36.

The Pope hath not, nor ever had in right any thing to do with the Preſentation, of any Church here in England Doct. & Stud. f. 127

The Preſentment to the Vicarage doth of common right belong to the Parſon unleſſe it be granted away by aſſent of the Patron and Ordinary. *F.N.B.* 33. *v.*

What Preſentation is good and what not.

If Coheires that have a Preſentation between them cannot agree upon their preſentment, and the eldeſt do preſent alone, this is a good Preſentment and it muſt be taken: So alſo if the Iſſue, Aſſignee, or Tenant by the curteſie of the eldeſt preſent, this preſentment is good. *Dyer* 29 *p.* 194. *Co. ſuper Litt.* 166. 186.

If the prochain avoidance be granted to me and two others, and they two preſent me, this is a good Preſentment. *Curia* 13. *Jac. B.R.*

If I be diſſeiſed of a Mannor to which an Advowſon is appendant, and the Advowſon is void, I may preſent before I have entred into the Mannor, and this Preſentation is good. But if the diſſeiſor dye ſeiſed, and after the Church become void, here I cannot preſent untill I have retontinued the Mannor. *F.N.B.* 33. *q. Kelw.* 169. *a. Dyer.* 5.

If two Coparcenors be of an Advowſon, and the youngeſt be within age and in Ward, and the Lord entermarrie with the eldeſt, and the Church become void, and he preſent in both their names, and after the younger comes to full age, and the Church againe becomes void, It ſeems if the younger will not joyn in the preſentment that the Preſentment of the elder is good. *Dyer*, 55. *p.* 5.

If there be two Joint-tennants, or Tenants in Common, or

Parceners, and one of them Present it seems this is good, but in this case the Bishop may refuse this Presentment, but if he doe accept and admit him, it seems the other is without remedy. And so it was held in *Kytes case pasch. 7 Iac. B.R.*

If an Infant have an Advowson, and he be 14 yeres of age, and then present himselfe one to it, this is a good Presentation. *Perk. Sect.* 15.

A Presentment to an Advowson by a Procurator or a Proctor to an Advowson is as good as if one did it by himselfe. *F.N.B.* 35 o.

The partie that is presented must be *Idonea persona.* (i) he must be both able and honest, And therefore if he be a meere lay-man, or an illiterate Clerk, or infamous for his life or condition, being a Bastard, a perjured person, a common Adulterer or murtherer: the Ordinary may refuse him, and the presentment will be lost, so if the presentment be made by an Usurious, or simonaicall Contract. *See Simony. Dyer* 292 *p.* 1. *Keln.* 50. *b. Dyer* 327 *Cro.* 5 58. *Crimpt. Jur.* 34. *b.*

What presentations belong to the Lord Chancellour, what not.

The Chancelour of *England* shall present to all the Churches of the Kings, which are in the Kings gift, and which he hath in the right of his Crowne, which are under the value of twenty pounds *per Annum* in the Kings books of first Fruits, and Tenths. *See Chauncelour & Broo. prescription* 86. *F.N.B.* 35. *al Contra.* But if the King have these Advowsons by another title *Contra.*

See more *Infra Laps. Quare Impedit. & in Baron & Femt & Chattells.*

Admission.

It is the allowance of a Clerk presented, when a Church being void there is a Clerk presented by the Patron to the Ordinary, and he after examination of him doth admit him able, in these words *Admitto te habilem*, and then doth record his name, but in this case the Ordinarie may take a reasonable time to examine the party presented, and therefore if the Ordinarie be in his Journey, he may appoint the party another time, and if he come not then or within the six moneths, the Ordinary may collate by the lapse. And if the partie presented such a one as against whom there is good cause of exception, as if he be insufficient, illiterate, infamous, a villaine, have

not

not his letters of Orders, or be a Baſtard, a Lay-man, within age, a murtherer, an Outlawed man, or the like, or if he have cauſe of exception againſt the Patron; As if he have ſtood excommunicate by the ſpace of forty dayes or the like, he may refuſe to admit him and juſtifie it. But if the Ordinary have no good cauſe of exception, he muſt admit the Clerk preſented, elſe the Patron may have a a *Quare impedit* againſt him. And when the Ordinary doth accept him, then he doth uſe theſe words. *Inſtituo te ad tale Beneficium habere curam Animarum*, of ſuch a Pariſh, *et Accipe Curam tuam & meam.* And this is called *Inſtitution.* Which is the act of the Biſhop. *Inſtitution.* By which Act without any further degree of proceeding, the Church is by Law accounted full againſt all perſons ſave only the King, and againſt him it is never full untill the partie be inducted alſo (*i*) untill the Arch-deacon put the Clerk preſented and inſtituted into the poſſeſſion of the Church, by delivery of the Ring of the Church doore unto him, and the ringing of the Bell. Which Act is called an *Induction.* But as to the Spiritualty (*i*) *Curam Animarum*, the partie preſented, *Induction.* is compleat parſon by the Inſtitution, ſo that he may celebrate divine Service, and Sacraments, or preach before Induction. But as to the Temporaltie, (*i*) the glebe and the Tith, he hath no right untill his Induction, and then is he full Incumbent, and till then he hath no Freehold or poſſeſſion in the glebe or tithes. *Co. ſuper Litt. 344. a. b. Articuli Cleri. cap. 13. 14. H. 7. 21. Dyer 326. 254. Co. 5. 58. Co. 4. 79. Dyer 292. Plow. 325. 525. Doct. & Student lib. 2 cap. 26.*

But Admiſſion is ſometimes taken in a more large ſenſe, and doth include Admiſſion and Inſtitution both in it. *Weſtm. 2. cap. 5.*

Right of Advowſon. It is a Writ lying where one hath an Advowſon in Fee, and right to preſent after the death of a parſon, and brings no *Quare impedit*: nor *Darrein* preſentment, but ſuffereth a ſtranger to uſurpe. In this caſe he hath no remedy but by this Writ, and herein he ſhall not recover the Preſentment, neither for that turne, for it is loſt for ever. *Termes of the law.*

Quare Impedit.

It is a Writ and lieth where I have an Advowſon of a Church, Vicarage, Chappell, Hoſpitall or Spirituall Benefice, and the Incumbent dyeth, and another preſenteth his Clerk or diſturbeth or hindreth me in my preſentment, that I cannot have the fruit thereof, then I may have this Writ to relieve my ſelfe. *Termes of the Law. F.N.B.* 33. *H.*

This Writ is commonly brought, againſt him that doth Preſent or diſturbe him, the party that is preſented, and the Ordinary that did admit and inſtitute the other: or if the Biſhop refuſe to admit and inſtitute my Clerk it muſt be brought againſt the Biſhop alone. *Kelw.* 53.

And if in this ſuit the Plea be depending till the ſix Moneths be out, ſo that the Biſhop doth preſent by the Lapſe, he that hath right and hath loſt his Preſentation ſhall recover damages of him that hindred him according to the value of the Preſentment. And therefore the Jury at the triall of every Iſſue in a *Quare impedit* are to enquire of three things.

1 Whether the Church be full, and by whoſe preſentment.
2 How long it hath been full.
3 Of what valew it is. *Co.* 10.130. *Dyer* 118. *Weſt.2.cap* 5. *Plow.*34 *Kelw.* 57.

Whoſoever will have this Writ muſt alleage in his Count, a Preſentment in himſelfe, his Auncеſtors, or ſome others under whom he doth claime the Advowſon, unleſſe it be in ſome ſpeciall caſe; As where a Church by Licence of the King is made Parochiall which ſhall be preſentable, &c. if he be diſturbed he may have this Writ, and need not alleage a Preſentment. *F.N.B.* 33 *H.*

It is good pollicy for him that hath cauſe to have this Writ, to have it as ſpeedily as may be, and to bring it againſt the Biſhop alſo, for this will prevent the danger of Lapſe to the Biſhop, Metropolitan, and the King. *Cook. ſuper. Litt.* 344.

where it lyeth: and where not.

In all caſes where a man may have an Aſſiſe of *Darrein* Preſentment he may have a *Quare Impedit*. *Termes of the Law.*

In all the caſes before of Preſentment, and in all others where a man hath right to preſent to a Church, &c. and he do preſent

preſent his Clerk to the Ordinary, and he refuſe to inſtitute him, the Patron may have this Writ. But if the Biſhop had good cauſe to refuſe him, he may plead it by way of excuſe, and if upon tryall it be found againſt the Biſhop, the Clerk preſented ſhall be admitted. *Co.* 5. 57. *Dect. & Stud. f.* 115. *Dyer* 328.

If I have the grant of the next Avoydance or Nomination of a Clerk only, and be diſturbed in that, I may have this Writ. *Kelw.* 161. *F. N. B.* 33. *B. Dyer* 48.

If a Biſhop be diſturbed to preſent where he ought to collate, he may have this Writ *F. N. B.* 33. *D.*

If the King be diſturbed to make Collation to his free Chappell, he may have this Writ. *F. N. B.* 33. *E.*

If a man recover an Advowſon by a Writ of Right againſt another, and when the Church is void, he do preſent another, and is diſturbed in it, he may have this Writ, and alleage his Preſentment in him againſt whom he did recover, without allegation of any other Preſentment. *F. N. B.* 33. *v.*

If a Parſon be Patron of a Vicarage, and the Vicarage become void, and a ſtranger preſent: the Parſon may have this Writ. *F. N. B.* 49. *k.*

If the Biſhop Collate by Lapſe, and before Induction of his Clark, the Patron preſent, and the Biſhop refuſe to inſtitute and induct him, no *Quare Impedit* lyeth againſt him. *Dyer* 277.

If a Partition amongſt Parceneres be of Record, ſhee that is diſturbed may not have a *Quare Impedit*: but muſt have a *Scire facias. Weſtm.* 2 *cap.* 5.

Aſſiſe de Darrein Preſentment.

It is a Writ and lyeth where I and my Anceſtors have had the preſentment to an Advowſon heretofore, and I have preſented now, and my Clark is ouſted, in this caſe I may have this Writ. And this Writ, and the *Quare Impedit* are to recover the Preſentment only, For if the Right of the Advowſon be in queſtion, it muſt be recovered by a Writ of Right of Advowſon. *F. N. B.* 36.

A Writ to the Biſhop.

It is a Writ Judiciall that lyeth where one hath recovered a Preſentment in a *Quare Impedit* or Aſſiſe *de Darrein* preſentment to the Biſhop to command him to admit his Clark that

that hath recovered. And if the ſuit were againſt the Biſhop alone, then this Writ may be directed to the Biſhop of the Dioceſſe, or the Metropolitan at the election of the party. And if in this caſe the Biſhop refuſe him the party may have a *Quare non Admiſit*. *F.N.B.*38.

Quare non admiſit. It is a Writ and lyeth where a man hath recovered an Advowſon, and he ſendeth his convenable Clark to the Biſhop to be admitted and the Biſhop will not receive him, then he ſhall have this Writ againſt the Biſhop. *Terme of the Law.*

Ne admittas. It is a Judiciall Writ directed to the Ordinary, and may be ſued out by either of the parties Plaintiffe or Defendant to command the Ordinary that he do not admit the Clerk of the other untill the Plea be diſcuſſed. And this is to be ſued within the ſix moneths and not after, for after he may preſent by the Lapſe. But if it be ſued before, he cannot Collate his owne Clark, nor admit any other mans within the ſix moneths *F.N.B.*37. *Finches Law.* 458.

Quare Incumbravit. It is a Judiciall Writ againſt the Ordinary, for one that ſueth a *Ne Admittas*, and doth after recover in a *Quare impedit* or Aſſiſe *de Darrein* preſentment though it be after the ſix moneths.

This Writ lyeth not before Recovery, if the Ordinary incumber the Church before, So neither for a collation or admittance before a *Ne Admittas*, but in that caſe he muſt have a *Quare Impedit*. And neither this, nor the Writ of *Ne admittas* will lye in a Writ of Right of Advowſon, though the Church become void, hanging the Plea, and the Biſhop incumber it. *F.N.B.*48. *Finches Law* 458.

Juris utrum. It is a Writ that lyeth for an incumbent whoſe Predeceſſor hath alienated his Lands or Tenements belonging to the Church or Benefice. *F.N.B.*50.

Vi laica Remota. It is a Writ lying where debate is between two Parſons for a Church, and the one of them with a power of Lay men or others, keepeth the other out with force, now the other in this caſe upon a Certificate hereof by the Biſhop of the Dioceſſe to the Lord Chancellor, may have this Writ to remove the force. *F.N.B.*54.55.

It

Is it a Commiſſion which the Ordinary may grant where two or more Clarks do claim a Church by two or more Patrons, to enquire who is the right Patron of the Church, and ſo whoſe Clark ſhall be admitted. *F.N.B.* 48. *new book of Entries* 465. *Jure Patronatus.*

It is where one that is not the right Patron doth preſent to a Church, and the party preſented is inſtituted and inducted, and ſo the Church is become full. This word is ſometimes alſo uſed for taking of royall franchiſes, a man hath no warrant for. *Cro. ſuper Litt.* 277. *Weſtm.* 2. *cap.* 5. *Uſurpation.*

This word is uſed in matters of Benefices, and defined to be where a Clark is preſented to a Church, and is inſtituted and inducted, and hath been in the poſſeſſion of the Church, ſix moneths, then the Church is ſaid to be full. And this is oppoſed to vacancy. *Kelw.* 88. 21. *Ed.* 4. 34. *Plenarty.*

It is a good plea, in Barre at Common Law, for a common perſon againſt another common perſon, in a *Quare impedit* to plead that the Church was full the day of the Writ purchaſed. (And againſt a Common perſon, Inſtitution is a good Plenarty without Induction: But in caſe of the King *contra*, for in caſe of the King, a Church is not ſaid to be full untill Induction.) for by the Common Law, if a common perſon preſent to a Church that doth belong to another common perſon, and the Church were once full, the Incumbent could not be removed, and the right Patron had no remedy but by Writ of Right of Advowſon. And although the uſurpation were upon an Infant, feme Covert that had an Advowſon by deſcent, tenant for life, &c. yet had the Infant, feme Covert, or he in Reverſion no remedy, but by this Writ. But now the Law is altered by the Statute of *weſtm.* 2. *cap.* 5. for Infants, Women Covert, and divers others. And at this day, The Incumbent may be removed in a *Quare Impedit*, or Aſſiſe *de Darrein* Preſentment if there be no a plenarty by ſix moneths before the Teſt of the Writ, ſo as the Incumbent be named in the Writ, elſe he can never be removed. *Cro. ſuper Litt.* 119. *b.* 344. *a. Cro.* 4. 79. *Plow.* 501. *Dyer* 217. *Cro.* 6. 49. *Cro.* 6. 48. *Prerogative.*

Regularly no man can be put out of the poſſeſſion of his Advowſon, but by admiſſion and Inſtitution upon a uſurpa-

mit tion

tion by a Presentation, and therefore if the Bishop Collate without title, and his Clark is inducted, this shall not put the rightfull Patron out of possession, neither in this case is he driven to his *Quare Impedit* or Assise *de Darrein* Presentment: But a usurpation by Collation may take away the right of Collation that is in another. *Coo. super Litt.* 344. *b.*

It is to be observed, That an usurpation upon a Presentation shall not only put out of possession him that hath right of Presentation but of collation also *Coo. idem.*

At the Common Law, if the Ordinary did refuse to admit, and institute the Clark of the Patron, or when any disturbed him to present so as he could not preferre his Clark, he might have his *Quare Impedit* or Assise of *Darrein* presentment, and if the Church were not full, have a Writ to the Bishop to admit his Clark. And if hanging the *Quare Impedit* against the Ordinarie for refusing of his Clark, and before the Church were full, the Patron brought a *Quare Impedit* against the Bishop, and hanging the Suit, the Bishop admit and institute a Clark at the Presentation of another, in this case if Judgement be given for the Patron against the Bishop, the Patron shall have a Writ to the Bishop, and remove the Incumbent that came in *pendente lite* by usurpation. And it is to be observed that albeit the Clark that comes in *pendente lite* by usurpation shall be removed, yet if the rightfull Patron being a stranger to the Writ present *pendente lite*, and his Clark is admitted and instituted, he shall not be removed. *Coo. super Litt.* 344.

Lapse. It is a slip or departure of a right of presenting to a void Benefice from the originall Patron, neglecting to present within six Moneths unto the Ordinary. And hence it is that a Benefice is said to be in Lapse, or lapsed, whereunto he that ought to present hath omitted or slipped his opportunity, and doth not present within six Moneths. *Coo.* 7. 27. 28. *Plow.* 498. *Cok.* 4. 117. *Coo.* 6. 30.

The effect of this. In this case where the Patron doth thus let slip his opportunity, be the avoidance by what means it may be, the Ordinary of the Diocesse shall have the Presentment to the Church for that time: And if he do not present within six Moneths after the time of the comming of the power of Presentment to him

him, then the metropolitan Bishop of the Diocesse shall have the Presentment for this turne: And if the Metropolitan also shall let slip his opportunity, and shall not present within six Moneths after the time of the Comming of the power of Presentment to him, then is the Presentment devolved to the King, and he by his Prerogative as *supreme Ordinarie* shall have the presentment that turne. And this began by a Decree of the Councell of *Latteran. Co.* 7. 27. 4. 117. 6. 30. *F. N. B.* 35. *F. Dodr. & Stud. lib.* 2. *cap.* 36.

But in this case if the Patron himselfe present before the Bishop of the Diocesse, the Metropolitan, though it be after the six Moneths, in this case the Bishop must admit him, and the Bishop and Metropolitan are barred. But if the Bishop collate his Clark, and then the Patron present his Clerk, he may refuse him. And if the King when his Turne comes suffer the right Patron to present, and his presentee is admitted, instituted, and inducted, and dyeth, now he hath lost his presentment. But otherwise the King is not limited to six Moneths, but he may present at any time. *Prerogative.*

And if the Patron present at any time during the first six Moneths vacancy, the Ordinary must admit his Clark, or he may have a *Quare Impedit* against the Ordinarie. *Dodr. & Stu. lib.* 2. *cap.* 36. *Stat.* 25. *Ed.* 3. *de Cleris cap.* 3. *& cap.* 8. *Co.* 7. 28. *Kelw.* 50. *b. Dyer* 277. 156.

If there be two Joint-tenants of an Advowson, and they do not agree within the six Moneths, in this case the Bishop shall present by the lapse. *Dodr. & Stu. f.* 115. *Where the Ordinary shall present or shall Collate by the Lapse: where not.*

If a Presentment be tendred to a Bishop when he is in his Journey, and he put off the Clark at that time, & bid him come to him three dayes after to be examined, and he come no more, but suffer the six Moneths to passe, in this case the Patron doth loose his Presentment, and the Bishop shall have it by the Lapse. (a) But if the Bishop himselfe be the cause of the disturbance, and so of the Lapse, as in case where he doth refuse the Clark without cause, or the like, heere it seems the Bishop shall not present by the Lapse. 14 *H.* 7. 21. (a) *Palmereade, Trin.* 3. *Jac.*

But if a Church become void by Resignation, or Deprivation for any cause within the Statute of 13. *Eliz. cap.* 12. or otherwise, there the Ordinary must give to the Patron solemn notice thereof, otherwise the Bishop shall not present by the Lapse: But if it become void by death, Cession and creation of the Parson a Bishop, here need no notice. *See Notice. Doct. & Stu. f.* 116. *Co.* 6. 12. *Dyer* 369. *Kelw.* 49.

If a *Quare Impedit* be brought before the six Moneths, and the Bishop be a Defendant in that Suit, in this case neither he, the Metropolitan, nor the King, may present by Lapse, for neither the Metropolitan, nor the King can present in any case where the Ordinary immediate cannot. *Co. super Litt.* 344 *b.*

Where the King not the inferior Ordinarie shall present.

If *Ne Admittas* be brought by the Patron before the six Moneths be out, then the Bishop cannot after the six moneths present by the Lapse, the Clark of any other, but he may present his own Clark notwithstanding. *F. N. B.* 37. *f.* 48.

If in a Frank chappell of the Kings, where the Deane ought to give the Prebends, if he do not collate within the six months the King shall present by the Lapse. *F. N. B.* 34. *F.*

If the Kings tenant have Title to present to an Advowson which is void, and the six months passe, and after the Kings tenant dye before the Bishop present by the Lapse, his heire with in age, and the Kings Ward, in this case the King by reason of his Wardship, not the Bishop by the Lapse shall have the presentation. *Fitz. N. B.* 35. *A.*

How the time shall be accompted.

The time of six Moneths given to him that hath right to present, shall be accounted in divers manners, after the manner of the avoydance For *Doct. & Stu. l. cap.* 31.

In cases of Resignation, Deprivation, and Refusall of the Bishop, the time of six Moneths shall be accounted from that time the Ordinary had notice thereof and not from the time of the Resignation, &c. But in case of the death of the Incumbent, or Cession, treating the Incumbent Bishop, whereof the Patron must take notice of at his perill, it is accounted from that time of that death, creation or Cession. *Dyer* 369. *Kelw.* 49. *Dyer* 328. *Doct. & Stud. lib.* 2. *chap.* 31.

After a union the six Moneths shall be accounted from the time of the agreement made between the Patrons. *Idem.*

If a Bishop be seised of an Advowson in the right of his Church, he shall have but one six Moneths time, and if he do not present in that time, the Metropolitan shall present. *per Justice Dodridge.*

It is a Suit for a Church in the Spirituall Court by one Incumbent against another, when they claime both by one Patron; and the right of the Patronage is not in question. As if a Parson be made Bishop, and hath a licence to hold his Parsonage, and the Patron present another which is instituted and inducted; the Bishop may have this Suit in the Spirituall Court. So where one hath one Benefice already, and then he accepteth another. So if two be presented to one Benefice by one Patron, this may be decided in the Spirituall Court. *The termes of the Law. F. N. B. 36. 37. Westm. 2. 5. 12. Ed. 4. 13.* *Spoliation.*

All Benefices and spirituall promotions for the most part do consist of Gleeb and Tithes. The Gleeb is that portion of land, Meddow, or Pasture, and such like which is parcell of, and belonging to the Parsonage, Vicarage, &c. And this the Parson may grant, or charge for his owne life at his pleasure. The Tithes are the tenth part of all prediall or personall fruits; which for the most part, belonging to God, and consequently to the Ministers of the Church, are given to them toward the recompence of their paines in their functions, in instructing their charge in the word of God, and their continuall intercession and Prayers, they do or ought to make to God for them. *Termes of the Law. Levit. cap. 27. verse 30.* *Dismes.* *Gleebe.*

And this the Parishioner is to set out for the Parson, who is to take away the same in convenient time; for otherwise the Parishioner may have his Action of the case against the Parson, or distraine it damage fesant, or put in his cattell and eat it, but he may not carry it into the Parsons, or his own Barn, or lay it aside any where to preserve it. *Hill. & Car. & R. Curia 21. H. 7.*

Tithes are divided into Greater, called *Majores*, and lesser, called *Minuta decima*. The greater are Corne, Hay, and such like; lesser are Piggs, Apples, and such like. They are also divided into Prediall (*i*) such as be paid of things that acrew and *Quotuplex.*

come of the ground only, as Corne, Hay, fruits of Trees, and the like. *Personall(i)* Such as be paid of such profits as come not by the increase of the ground, but by the labour and industry of a mans person, as by buying, selling, gaines of Merchandize, and of Handicrafts men, Labourers, and such as work for hire, as Carpenters, Smiths, Weavers, Masons, and such like. *Mixt.* (i) Such as be paid of such things as increase partly of the ground that they be fed upon, and partly of the keeping, industry, and diligence of the owner as, Calves, Lambs, Piggs, and such like. But some divide all Tithes thus: and call those things that come from the earth naturally without labour, as, Grasse and fruit of Trees *Predialls* Immediate, for that they come immediatly from the ground. And the rest that require the industry and labour of Man to help their production, as Corn and Cattell. *Predialls mediate*, for that they are produced by the mediation and means of man. Sometimes also they are distinguished by *Reall* and *Personall*. *Termes of the Law Doct. & Stu. f.* 168. *a.* 174. *a.* 172. *b. Stat.* 2 *Ed.* 6. *cap.* 13.

The nature of Tythes.

These Tithes by the ancient Common Law differ in their nature from other Inheritances, for they are an Ecclesiasticall Inheritance, that a lay-man was not capable of, nor could have by purchase, or descent, as other temporall possessions; but of their proper nature are due only to Ecclesiasticall persons by Ecclesiasticall Lawes; neither were they grantable by the same words, As if one had granted a Close *cum pertinentiis*, the Tithes did not passe. For they are Collaterall to the estate of the Land out of which they come; And they are of common right to be paid out of all Lands, Meadows and pastures, and untill their severance are meere Ecclesiasticall things for the substraction whereof no remedy is given by the Common Law, neither will any unity of possession extinguish or suspend them, but they remaine still in *Esse*. And hence it is, that albeit, one which is a parson impropriate infeoffe another of part of his Gleeb, or make a Lease to him of it, yet he shall have the Tyth thereof against his own Feoffment. *Coo.* 11. 14. *Dyer* 43. 42. *Ed.* 3. 13. *Coo.* 1. 111. *Broo. Sect.* 178. *Broo: Dismes* 17.

Unity.

Extinguishment

So if a Parson purchase Land within his Rectory, and after make a Lease of the Parsonage, the lessee shall have Tythe of his new purchased Land. But now by divers Statutes, the nature of these and other Ecclesiasticall duties being come into Lay-mans hands are changed, and are become of the nature and have the Incidents of temporall inheritances. And therefore they shall be accounted Assets, the Husband shall be Tenant by the Curtesie, the Wife shall be endowed of it, and they will passe by conveyances in the temporall Courts, only this Ecclesiasticall quality they do still retaine, that the owner or possessor thereof may sue for the subtraction of them in the Ecclesiasticall Court. *Statutes* 31. *H* 8. *cap.* 13. 37. *H.* 8. *cap.* 4. 32. *H.* 8. *cap.* 7. 1 *Ed* 6 *Cap.* 14. 1. *El.* 2 *Ph.* & *M. cap* 8. *Co. super Litt.* 159. *a.*

who shall pay Tythes: and who not. And in what manner they must pay or set it forth.

Every one that cannot exempt himselfe by some speciall custome, Prescription, Composition, or Act of Parliament, must pay Tythe in kind, and must duly and without covin set forth the same; And therfore if he set them forth once, and presently after take them away againe, this is no setting forth of his Tythe within this Statute. *Curia. B. R. 8. Car. Stat.* 2 *Ed.* 6. *cap* 13. 32. *H.* 8. *cap.* 7.

The Farmours of *Aliens* shall pay the Tithes of their lands to the Parson or Vicar of the Parish, notwithstanding the lands be seised into the Kings hands, or any probibition come. *Stat.* 5. *H.* 4. *cap.* 11.

If a Parson demise his Glebe to a Lay-man, he shall pay Tithes: But if the Parson keep it in his owne hand. *Contra. Bro. Dismes* 17.

If one purchase a Mannor and Rectory which is discharged of Tythes, lease part of his Demeasnes, in this case the lessee must pay Tithe for this: so if a Parson purchase a Mannor, and and after he lease his Parsonage, he shall pay Tithes himselfe: and if he make a Feoffment of the mannor, his Feoffee shall pay him Tithes. *Idem Dyer* 43. *p.* 21. *Crimps. Jur. f.* 65. *a.*

Every man must truly fully effectually and justly without fraud or guile set out and pay their prediall Tithes in their proper kind, as they used to do forty years before the making of the Statute. And if any man carry any such or like Tithes which

which have been used to be payd within the said forty yeares, or ought to be paid before he hath set forth the same Tithe, or compounded for the same with the Parson or Proprietary, he shall forfeit the treble valew of the same Tithes so taken away. And for the manner of setting it forth, *Consuetudo loci est observanda* (a) For if the Custome of the place be not to set the Parsons part up an end in shoks, the owner is not bound so to do. (b) And as the Custome of some places have been to leave it in Grasse, of others, to leave it in Swathes, of others to leave it in Winerowes, of others to leave it in grasse Cocks, so if it be so set forth, it sufficeth. 2. *Ed.* 6. *cap.* 12. *stat.* & 32. *H.* 8. *cap.* 7. (a) *Smiths case Co. B. Curia.* (b) *Pasche* 17. *Ia. Co. B.*

Every person exercising Merchandises bargaining and selling, clothing, and handicraft or other art or faculty being such kind of persons and in such places as forty years before 2 *Ed.* 6. did use to pay personall Tithes, or such as ought to pay such Tithes (other then common daylabourers) brought yearly at or before Easter to pay to the Parson the Tenth part of their cleere gaines, their charges and expences deducted. And Handicrafts men also where they were used to pay Tithes, forty years before the Statute. *Stat.* 2. *Ed.* 6. *cap.* 12.

Such persons as hold any of the Abbey Lands, that before the dissolution of them paid no Tithes, shall pay no Tithes. *See infra. Stat.* 31. *H.* 8. *cap.* 13.

Prerogative. No Tithes shall be paid by the King or his Pattentee for any Land lying within the Forrests that have not used to pay Tithe. *Mris Davis case M.* 16. *Ia. Co. B.*

No Tythes shall be paid by the King for such Lands of his as are in his own hands. *Crompt. Iur* 60. *b.*

For payment of Tithes in *London. See the statute of* 37. *H.* 8 *cap.* 12. *at large.* What persons shall pay Tithes, and after what manner.

Of what things and in what cases Tythes shall be paid: And of what, and in what case not. And how.

Tythe must be payd for all things that acrue and arise from yeare to yeare by the strength of the Earth it selfe, with Gods blessing upon it: or by it, and mans industry together: As for the fruits of his Meadow the tenth of the Hay: of land, the tenth of the Corne: of Pasture, the tenth of the profit of the

the Cattell, as Calves, Lambs, &c. or of the Rent: of Fruit-trees as Apples, Pears, Nuts, and the like, the tenth of the fruit, that doth come from them yeerly. And the tenth part of all this is to be paid without deduction of charge. *Coo.* 11. 15. *F. N. B.* 53. *Doct. & Stud.* 168. *a. b.*

But a man shall not pay the Tenth of the fruit of his labour, but in such places where they have used it, and there is a speciall Custome for it, and there the person may sue for such personall Tythes. If one erect a new Mill in his own Ground, he must pay Tythe out of it, and out of all new grist Mills Tythe is to be paid. But not for fulling, Iron, Lead, Powder, Edge, Copper, Tinne-Mills, for these Mills are but Engines of their occupation, nor for ancient grist Mills that never paid Tythe. *Doct. & stud. f.* 172. *b. Quod. Pasche* 17. *Iac. Articuli Cler. cap.* 5. *Johnsons case pasche* 17. *Iac. B. R.*

Tythes must be paid of barren Cattell that are fatted, and killed, or sold, though at the first they were bred for the Plow or Pale. *M.* 2. *Iac. B. R. Webs case &* 8. *Ia.* 3. *Im.*

If a man keep and depasture his Sheep in one parish, by the space of a yeare, he must pay his Tyth wooll of them, and that to the Parson of that Parish where they were kept. And if they be there for lesse time he must pay Tyth *pro rata* according to the Custome of the place, which is called Rate Tythe: *F. N. B.* 51. *D. G. Bro. Dismes* 16. If a man have saleable under-wood that he doth use to cut every 7. 10. or 20. years if it be under 20. yeares growth, it is called *Sylva cadua*, and of this the Parson is to have Tythe as often as the same is cut, if Tythe have been usually payd for it. Otherwise it seemes not by the opinion in *Doctor et Student*, but it seems the Law is otherwise now. And therefore that a Prescription *De non decimando*, for under-wood in one Parish or person is not good: but such a Custome in a County or Country is good. *Trin.* 14. *Iac. Curia B. R. Plow.* 470. So also is he to have Tythe of the Trees and Lops and branches of such Trees as are not Timber, as Horne-beames, Pollengers, Sallows, Hasells, and such like, whether the Trees be above twenty years growth or not, unlesse the custome of the Country to pay no Tythe, but not of Timber Trees, as Oak, Ash, and Elme, and such like

like, nor yet of their Lops nor shrouds, though usually lopped. Nor if a man do cut down his fruit trees, shall the Parson have any Tythe thereof because he had Tythe of the fruit before. Also in Countries where Timber is scarce, and Beeches are converted to building, for the habitation of man, or the like, they are also accounted Timber, & there perhaps they may be Tythe free, but ordinarily it seems that Beech, Birch, Aspe, Maple, and the rest of the not Timber trees before must pay Tythe. *Stat.* 45. *Ed.*3. *cap.* 3. *Bro. Dismes* 19. *Plow.*470. *Doct. & Stu.*171. *a. Doct. & Stu.*168. *a. Coo. super Litt.*53. *a.*

It seems Tythes are to be paid for fishings, Bees, Doves, and such like things. *Doct. & Stu.*173. *a.*

Personall Tythes must be paid of Crafts and Marchandise and of the lucre of buying and selling, and also of Carpenters, Smiths, Weavers, Masons, and such like as work for hyre, they must pay Tythe for their hyre, or give something in certaine for it. So if a Fee or Annuity be granted to one for his labour or service in any businesse, here the whole Fee shall be Tythed, but generally, there must be a deduction of charges, and herein the Tyth is to be paid out of the cleer gaines he hath by his industry, and therefore if one give me a Horse, or any such like thing, or a House fall to be mine by descent, and I pull him downe and sell him, no Tythe is to be paid for this, because it is not by his industry. *Doct. & Stu.*173. *a.*

No Tythes regularly shall be paid of any things but such as yeild profit from year to year, and that by the manurance of the owner: And therefore *F.N.B.*53. *E.*

Stat. 45 *Ed.* 3. *cap.*5. *Coo.* 11 48. 81.

A man shall not pay, neither shall the Parson have Tythe of Timber-Trees that are of the age of twenty years or above, neither of the bodyes themselves whiles they are Timber, nor after when they are become Dotards, nor whiles they are standing, nor when they are cut, whether the owner use them or sell them: nor for the Lopps or shrowds, whether they were lopped the first twenty years or not, (w) or be used to be lopped every seven years or not. Nor for their Bark or Root. But for their yearly fruit, as Mast and the like, for these the Parson must have Tythe. And no Custome in this case will make such Trees, their branches, bark, or Rootes tytheable

Tythable. *Doct. & Stu. chap. 55.* (v) *Hill. 38. Eliz. 8. R. Adjung. Num viri patenſo* 4. (w) 26 *Eliz. Molins caſe. Plow.* 470. *Co.* 11. *Doct. & Stu.* 174 *b.*

No Tythes ſhall be payd for Mines, and Quarres of Cole, Tinne, Lead, and ſuch like which a man doth finde and digge in his own Land, becauſe it is not an anuall profit, and whether the owner ſell it, or ſpend it, the Law is all one. And therefore if a man take a Tinne work, and give the Lord the tenth Diſh (as the manner is) the Parſon ſhall have no tythe of this tenth Diſh. *F.N.B.* 53 *G. Crompt. Jur.* 78. *a. Doct. & Stu.* 172.

The Parſon ſhal have no Tythe for the rakings of Corn, that are involuntarily left and diſperſed about the Land, except there be more left then uſuall of fraud, but if he leave ſtanding corne to bind up his rakings, he will have Tythe of that ſtanding Corne *Hill.* 8. *Car. B. R.*

The Parſon ſhal not have Tythe of the ſtubble or ſtraw Eadgrow of Corn that is left after the reaping when he hath had tythe of the Corne before, though the ſtubble be left ſomwhat longer than uſuall, and the owner cut it after. *Non datur Actio pro Ovo.* But if he leave it unreaſonable long covinouſly to deceive the Parſon, there he ſhall pay Tythe for it, or if he do not ſow his Eadgrow as he hath been uſed, there he ſhall have tythe of the Eadgrow, nor for the cattell feeding on an hamouth after he hath had Tythe of the Hay: Nor (as it ſeems) for his ground the ſecond mowing unleſſe it be where ſecond cutting of Graſſe is uſuall; for it is generally true in Tything. A man ſhall not have Tythe twice for the ſame thing, unleſſe it be where is a double increaſe, as of Lamb and Wooll of the ſheep. (2) Nor for the Horſes or Oxen that a man doth uſe for his travaile or Husbandry: Nor for the barren or dry cattell that one doth breed up *In uſum Agriculture* or *Lacticinij* for his Plow and Payle, whether he keep them in leaze or in Common; nor for the herbage taken by theſe cattell, except there be a cuſtome for it, and then perhaps he may, nor for Tares or the like ſowed to feed his cattell, Horſes or Oxen. Nor for Common of Eſtovers: Nor for the Wood or fuell that is cut (a) to burne in his houſe or for mounds, fences,

and inclosures, nor for that which is left and remaineth of it, when there is a little more cut then doth serve that turne. And so was it agreed *per Curiam. M.37.& 38.El.2.B.R.* (3) nor for Agistment (*i*) taking in of Cattell. As if I receive the beasts of *B* to manure my Land, no Tythe shal be payd for this. But if I take in cattell to make profit by them, *Contra*: for that some say I must pay Tyth of this profit. And yet it may be if the Custome of the place tythe free this may help. And it seems to some not Tythable in any case, because Tythe is paid for the cattell themselves that do feed. *Coo. B. pasche.* 17. *Iac. per Justices. Smiths case Hill.7.Iac.B. R. Dict. et fix.* 168. (2) *Trin.* 9. *Iac.B.R. et M.2.Iac.B. R. Curia* 8. *Car. B. R.* (*a*) *Trin.*3. *Iac.R:R. accord:* (3) *per Iust. Dodd.* 18. *Ia.B.R: F.N.B.*53.*G.*

If one Convert a Barren Heath or waste ground into arable or Meadow by his industry, and no Tythe hath been paid out of it before, in this case for seven years after, the first improvement he shall pay no tythes in kind for it, but if any thing were paid before for it, he shall continue that payment during the seven yeares, and if it were discharged by Act of Parliament, so it shall continue. *Stat. 2. Ed. 6. cap.*13. *Dyer* 170. *p.* 5.

Tythes shall not be paid for habitation in houses, or out of Rents reserved on Leases or issuing out of Lands reserved and created meerly by the act of the party, unlesse it be where they be payable by speciall custome, as in *London. Stat.*37 *H.8. cap.* 12. *et* 2. *Ed.6. cap.*13. *F.N.B.* 250 *Coo.*11.26.

No Tyth shall be paid of Hounds, Apes, Threshes, Popping-joyes and such like.

If one make a Hedge about his Corne, the Parson shall have no tythe of the Hedge, for it is for the defence of his Corne. *Hil.8.Car.B.R.*

The Parson can have no Tythe for the Corne that is sowed for the Cattell and eaten therewith standing, where they have beene used to doe so, as in divers places they have. *Sams. case*

If one have arable Lands amongst which are sladds of grasse, and he pay the Tythe of the Corne he shall not pay Tythe for this grasse, also whether he cut or eat it. *Adjudge* 17. *Ia. Ras. Coo. B.*

If one keep a houſe of Husbandry and hath dry Cattell, he ſhall not pay Tythe for the Graſſe they feed. *Curia M. 17. Ia. B. R.*

If one pluck down his houſe and ſell it, or ſell away his land, no Tithe is to be paid for the mony that is made of this, where a man hath but nine Pigs or ſix Calves, it ſeemes the Parſon ſhall have no Tythe for theſe, becauſe thy are not divideable as Wooll, and other things are. *M. 7. Iac. B. Doct. & ſtu. 170. a.*

No Tythes ſhall be paid for Conies, for no Tythes are due for them of Common right, and if the Parſon ſue for them, he need not prove his ſuggeſtion, according to the *Stat. of 2 Ed. 6.* as in other caſes he muſt. *Experientia.*

No Tythes of marriage goods ſhall be required of any perſon within Wales or the Marches thereof *2. Ed. 6. cap. 13.*

But in all theſe caſes of Tything, the cuſtome of the place doth for the moſt part guide and govern the Law for the matter and manner. And therefore know what the Cuſtome is, ſee more in *prohibition.*

If Hay grow on the ground of *H.* and he cut it, and put it into a Rick, and a while after doth ſell the Rick to me, I ſhall not be chargable for the Tythes due upon the ſeverance, but the Parſon muſt take his remedy againſt him. *per Ch. Inſt. B. R. Hill. 16. Iac.*

Of whom Tythes ſhall be recevered, where two or more ſeeme chargeable.

If a man buy under-wood of mee that is Tytheable, or corne on the ground ſtanding, he muſt pay the Tythe and not I: But it ſeemes of other things, the Law is otherwiſe if a man ſell his ſheep of which I ought that am Parſon to have rate Tythes, that I muſt ſue the ſeller and not the buyer for this. *Doct. & ſtu. 171. a.*

Who ſhall have Tythes and, to whom Tythes ſhall be paid, and to whom not. Prerogative.

No Lay-man by the Common Law was capable of Tythes except in ſome ſpeciall caſes. But ſpirituall perſons or at leaſt a mixt perſon as the King, and his Pattentee, by his prerogative, were onely capable of them. And to them they ought to be paid. But before the Councel of *Lateran* men might have paid their Tythes to what ſpirituall perſon they would, & they were not bound to pay it to the Parſon, Vicar, Proprietary, Portioner, or their Farmors or Deputies of the places where the Tythes ariſe as now they are. *Cro. 2. 44. Brow. Diſmes 16.*

If a man dwell in one Parish and have Common of Pasture in another belonging to his living where he doth dwell and he doth take and use his Common there: In this case it seems the Parson of the place where the owner of the cattell doth dwell, not where the common is, shall have the Tythe. *Trin. 7. Iac. B.R.*

Rate Tythe. Where Beasts or cattell go in one Parish one halfe of the yeare, and in another Parish another part of the yeare, in this case each Parson of either Parish, shall have the Tythe for the *Prerogative.* the time the beasts werein either parish. And so for more or less time, if it be by the space of a Moneth, but if it be lesse it seems no Tythe is payable, and this is called Rate-tythe: And whether the cattell be there as estrayed, or otherwise it is all one to the Parson, unlesse it be in the case of common, *infra. Broo. Dismes 16. Trin. 7. Iac. B.R.*

The Tythes of Forrests that are out of the limitts of any Parish belong to the King and he shall have them, or may grant them to whom he will, and neither the Bishop of the Diocess nor any other shall have them; and the King may sue for them in the Exchequer. *Broo. Dismes. 10 F. N. B. 40 22 Ass. 75. Crompt. Iur. 52 b.*

If a man have Cattell tytheable going in a great wast or Common, whereof the Parish is not certainly known, he shall pay the Tythes of the increase of the said Cattell to the Parson &c. of the place where the owner of the Cattell or beasts dwelleth. *Stat. 2. Ed. 6 cap 13.*

If there be two Parishes together that have Common together, because of vicinage, and the Cattell of the one Parish do stray and abide in the other Parish, yet no Tythe shall be payd for them to the Parson of the Parish whether they doe stray, but to the Parson of the other Parish. *Trin. 7. Iac. B.R.*

Where they may be had or claimed by Prescription or not. And how? All the Tythes and other fruits and profits of Benefices during the vacation of a Benefice must be paid to the next Incumbent, and the Ordinary of the place must appoint one to collect it, and to him it must be paid, and afterward restored to the Incumbent of the place. *Stat. 31. 8. cap 11.*

A Parson or Vicar may prescribe to have a certaine summe of

of mony out of every pound received for houses let in great Cityes. And this it is like began, as a *modus decimandi*, for the ground in which the house was built. *Coo.* 11. 16. *Stat.* 37. *H.* 8. *cap.* 12.

In all Cases where the Parson is not to have Tythe in kinde but somewhat for the Tythe, as the owner of the Land may prescribe to be discharged of payment of Tythe for that, so the Parson or Vicar may prescribe to have this thing as a *modus decimandi*, for the which the land is discharged. *Cook.* 2. 44.

One may by a Prescription have a portion of Tythes in the Land of another: or the Tythes of such a place as belonging to a free Chappell. And thus a Parson may prescribe to have Tythes in another Parish, as belonging to his Parsonage. *Brie* Prescription 85. *Fitz. Iurisdiction* 41. *Coo.* 2. 44. *Old Book Entries* 7. 636.

A Lord of a Mannor may prescribe to have all the Tythes of such a place in recompence of a certaine Pension payd by him yearly to the Parson: But he must take heed to the manner of his prescription. *Coo.* 4. 45.

A Parson by Prescription may have Tyth of Colts coming of a mans Mares, for Pannage coming by a mans Wood, and for Butter and Cheese, and Milk in the winter time. *Fitz. N. B.* 51. *H.*

One may Prescribe to have some other part of corne or such like thing in the nature of a Tythe, and this is a good Tythe. *Fitz. Iurisdiction* 49.

The Vicar may have any of the Tythes by Prescription, and if he claime any, he must have them by Prescription or Composition or els he can not make a title to them as a Parson may to the Tythes of his owne Parish. *Fitz. Colan* 36. *Iurisdiction* 11.

No man shall be compelled to pay any Tythes for any Lands or tenements which by the Lawes and Statutes of the Realme or by any priviledge or prescription are not chargable in the payment of such Tythes, or be discharged by any composition. *Stat.* 2. *Ed.* 6. *cap.* 13.

And howsoever forty yeares may serve for a prescription for Tythes in the Spirituall Court, yet by the Common Law,

the

the preſcription muſt be in this caſe as in other caſes of preſcription, time out of mind. *See preſcription, Crompt. Jur. 60 b. Co. ſuper Litt. 114. a. Co. 2. 44 a.*

Any man though he were not by the Common-Law capable of Tythes in *permancy* yet is capable of diſcharge of Tythes in his owne Land and therefore

where a man ſhall be diſcharged of payment of Tythes by Preſcription, or Compoſition: And what Preſcription or Compoſition ſhall be good or not. And how it ſhall be taken.

A Preſcription to pay 4 *d.* or any other ſmall ſumme of money, or other thing in liew and recompence of Tythes acrewing out of ſuch a cloſe or place is good. And this ſometimes is generall, to pay ſuch a thing for all manner of Tythes ariſing out of the place. And ſometimes it is ſpeciall (*i*) to be paid for the corne, or Hay, of the cloſe or both only and not for all the Tythes. And let him that hath this exemption take heed leaſt he looſe it not, for if he preſcribe ſpecially as before and after convert and change the nature of the cloſe As for example, if a man pay twelve pence for his Tythe of Hay in ſuch a cloſe (called in ſome places *Lammas Tythe*) if after he turne the cloſe into Hop-yard or arable and ſow it, in this caſe his Preſcription is gone. But where the Preſcription is generall, there ſuch alteration doth not deſtroy (*i*) the Preſcription (*b*) And if one have a Farme, and he pay twelve pence for the Tythe Hay of the whole Farme, now if he turne any of the Wood of the Farme into Meadow, he muſt pay Tythe Hay for that part. (*c*) And if ſuch a one that hath ſuch a Preſcription, pay his Tythes in kind but a few yeares together, hereby he may looſe his preſcription *Curia Barons caſe Paſche 18. Ja. B. R. Co. ſuper Litt. 114. Nowells caſe M. 43. & 44 Eliz.*

But a preſcription for a perſon or a Pariſh *in non decimando.* (*i*) to pay no Tythes nor any thing for it, is not good, neither will ſuch a Preſcription diſcharge a man. (*b*) And yet a whole County or Countrey may preſcribe in *non decimando*, as the wild of *Suſſex* (being 40 Pariſhes) do for their underwood, and this is allowed. Alſo one Pariſh or perſon may plead a diſcharge of payment of Tythes which is *tant amount*, And a ſpirituall perſon capable of Tythes by the Common Law (it ſeemes) may preſcribe in a *Non decimando*. As the orders of *Ciſtertienſes*, &c. did, and were diſcharged thereby.

See

See the Case, *Dyer* 277. *p.* 60. (*z*) And the case of Parson *Pekirks*. where an Abbot prescribed to pay nothing for the Tythe of a Close, but Lamb and Wooll, and no Hay nor corn, nor nothing in lieu of it, and it was allowed good. (*d*) And the Lands of Religious persons might have been discharged of Tythes by Prescription, Composition, &c. *Dalt. & Stu. f.* 471. 166. 167. *Co.* 2. 44. *a. b.* (*b*) *Trin.* 14. *Ja. B. R. Curia. Co.* 2. 44. (*c*) *Dyer* 349. *p.* 16. (*d*) *Wrights case*, *see Co.* 2. 48. *b.*

If a Parishioner prescribe that he is to put the corne in Hillocks or shoks, and for that the Parson is to have no corne the second yeare, or no corne out of some part of the ground every yeare, it seems to be a good *modus Decimandi*, for without speciall custome men are not bound to put their corne in shoks. *Sm. 1 his case Hill. 7. Ja. B. R.*

If one prescribe that the custome of the place is, that they that have but seven Lambs or under, shall pay but one halfe penny a Lamb for the Tythe of the Lambs, this is good. *Curia pas. 7. Ja. B. R.*

If one prescribe that, because he doth pay Tythe Hay therefore he hath paid no Tythe corne, or the like, this is not a good Prescription, neither will it discharge. So if he prescribe to be discharged of payment of Tythes in one place, because he doth pay Tythe in another: or to pay no Tythes for some Cattell, because he doth pay two pence a peece for every Cow: or to pay no Tythe Lambs, because he doth pay Tythe wooll. These are not good Prescriptions. *M. 2. Jac. B. R. Adjudge. Fleetwoods case. 7. Jac. Co. B.*

A man may be discharged also by grant or composition, for before the Statutes that restrained Ecclesiasticall persons, the Parson, Patron, and Ordinary might have discharged any man that was a Parishioner from payment of Tythes in all, or part at their pleasure. And therefore a man may be discharged of Tythes by such a Composition (*a*) That such a peece of Land or Annuity was given to the Parson heretofore in recompence of such tythes, or the like, for a Parishioner might give part of his Land to the Parson to be discharged of tythe in the residew. 8. *Ed.* 4. 14. *Co.* 2. 24. *Regist. fol.* 38. (*a*) *Fitz. jurisdict.* 45. 35.

Such

Where a man shal be discharged by Act of Parliament. And how the same Act shall be taken.

Such Lands as did belong to any Monastery, Priory, or such like houses, and were discharged from payment of tythes, in the hands of the Abbots or Priors, and came to the King, by the Statute of 31 *H.* 8. shall be held discharged of payment of tythes in the hands of such as have it now. *Vide infra.* So that now by this Statute. If a man plead and shew a perpetuall unity of possession in the hands of the Abbot, Prior, &c. And that no tythe was paid by the Farmors, &c. before nor at the time of the Statute, he shall be discharged now. (2) But then in these cases. This unity of possession to discharge must have these properties, besides that the Land and Rectory must come and be given to the King by the Statute of 31 *H.* 8. 1 It must be *justa.* (1) The Abbot must have a lawfull and not a wrongful estate in the Lands, and in the tythe. 2 It must be *aequalis*, he must have as great an Estate in the lands as he had in the tithes *Et sic e contra.* 3 It must be *perpetua*, And such also as whereof a perfect discharge may be supposed or presumed in law, for if it appear that the discharge was by Impropriation, & that the Impropriation is now dissolved, this is no discharge: (*i*) time out of minde, for if the Monastery or Priory were built within the time of memory, &c. or it were appropriated within the time of memory, and it paid tythe before, this will not discharge it. 4 It must be *libera*: (*i*) No manner of tythes must at any time have been paid out of it: (*o*) And yet some Judges have held, that a generall Allegation in this case of unity of possession of the Rectory, and of the Lands out of which Tythe is demanded in the Abbot, &c. at the time of dissolution is sufficient, without shewing all this before. But if he do plead or surmise thus in speciall, it seemes it sufficeth him to prove the unity of possession in the Abbot, &c. and the Parson must prove any of the other matters, if he will have advantage of them. And it is agreed by all that he need not shew how the discharge began. *Coo.* 2. 28. 11. 14. But in case of a Prohibition where the party must prove his surmise within six Moneths, in this case some proofe must be made, but any slender proofe, as by hearesay, or the like will suffice. *M.* 17. *Ia. B. R. Bunglos case. Coo.* 11. 146. And it is sufficient in these cases to prove that no Tythe hath been

been paid in the time of memory, for then it shall be presumed to be Tythe-free unlesse the contrary can be proved. *Stat.* 31. *H.* 8. *cap.* 13. 7. *H.* 4. *cap.* 6. 32. *H.* 8. *cap.* 7. *Co.* 11. 14. 2. 48. 47. 45. (2) *Etiffint fuit de opinion de Ch. Justice M.* 18. *Iac. Co. B. in Gerrards case.* (a) *Trin.* 3. *Iac. Popham et Williams, et Just. Warburton* 18. *Iac.*

If an Abbot were Parson impersoned, and had Land within the same Parish, and all this doth come to the King by suppression of the Abby; and the King grant the Land to one, and the parsonage to another, the Grantee of the Land shall pay no Tythe. *Crompt Jurisd.* 60*b.*

If Lands were in the hands of the Abbot, and of his Farmers time out of mind charged with payment of no more Tythes, but with Lambe and Wooll, and discharged of the rest: now it shall continue so discharged still. *Dyer.* 349. *p.* 16.

This branch of the Statute of 31. *H.* 8. was made to avoid two mischiefs. 1. Because otherwise all the Impropriations of the Rectories to the houses of Religion had been disapropriated: for the body to which the Rectory is appropriate, being dissolved the Rectory must needs be dissolved also. 2. Whereas divers religious persons were discharged of payment of Tythe, some by their order, some by composition, some by prescription, some by the Popes Bulls, &c. and the greatest part of the houses were founded before the Councell of *Lateran*, it were a thing impossible by any search to finde these discharges. *Co.* 247*b. Dyer* 277.

But this unity of possession, although it have all the properties before mentioned, yet will it not serve to discharge any of those Lands that did belong to any of the Houses or Colledges that were given, and came to the King by the Statutes of 27. *H.* 8. or 1 *Ed.* 6. onely, for those Statutes have no such clause of discharge: But if they had been given to the King by either of those Statutes of 27. or 1 *Ed.* 6. and the Stat. of 31. together, there the discharge may hold: Neither in that case where the houses came to the King by 31. *H.* 8. will it availe, 1. If it can appeare that the house hath been built within time of memory. 2. When it will appeare that before the dissolution of the House, the Farmers of the Demesnes did at

any time pay Tythe to the Parson. *Stabitur presumptioni donec probetur in contrarium.* And therefore this comes of the Parsons part to be shewed if he will have it to appeare. *Gerrards case M. 18. Ia. Co. B. Adjudge, Co. 2. 49. a. b. 46. a. (2) Co. 11. 14. (2) Co. 2. 48.*

The Parson hath no meanes to compell a man to cut his Corne untill his own pleasure, and yet if a man suffer his grasse or corne to stand so long untill it perish of purpose to plague the Parson, it seems the Parson may sue him in the Spirituall Court. *Doct. & stu. 169 a.*

The Parson when the grasse or corne is cut cannot take untill it be severed by the party owner of the Land himselfe, and if he do, he is a Trespasser to the party, and he may have an Action of Trespasse against him, unlesse some speciall custome help the Parishioner. *Old Book of Entries fol. 636.*

And when the corne or other prediall Tythe is cut and severed, the Parson shall have reasonable time to take it away, (2) And although it be likely to perish, yet neither the owner of the Land, nor a stranger may take it away, but he must be subject to an Action of Trespasse. See *Trespasse.* (3) But if the Parson do not remove it in a reasonable time, the owner may put in his Cattell, and eat it, and the Parson is without remedy. *Broo. trespasse 225. (2) Broo. Dismes. 6. (3) 12. Ed. 4. 6.*

(1) But if the party do not duly and justly set out his prediall Tythes or agree for them, before he take or carry away his corne or other things that he ought to Tythe, the Parson (be he spirituall or lay) may have a double remedy against him. For he may sue for his Tythes, and then he must sue in the Spirituall Court, (2) and cannot sue for them in any other Court) and there he shall have a sentence for them, and to recover the double valew of them, and double costs of suit. And if the party refuse to obey the sentence of that Judge, upon a Certificat by him, made to two Justices of the Peace, they may commit him to Prison until he enter into a recognizance, to fulfill the order of the Ecclesiasticall Judge. Or the Ordinary may excommunicate him, and proceed as in other cases against him. And the Parson may also if it be prediall Tythe

that is ſubſtracted bring an Action of debt againſt the Pariſhioner upon the Statute of 2 *Ed.6.cap.*13. And thereupon he ſhall recover three times the valew of the Tythes ſo taken away. And the ſentence in the ſpirituall Court is no plea in Barre to this Action. (3) But if a man do duly ſet forth his Tythes, and the Parſon doth not take them away, but ſuffer them to be taken or ſpoyled, the owner of the Land is not chargable with this. (1) 32. *H.*8. *cap.*7. 28.6. *cap.*13. *Co. ſuper Litt.*359. *a.* (2) 18. *Ed.*3. *cap.*17. (3) 12. *Ed.*4.

And if any ſumme of money be due to a Parſon or Vicar, as a *Modus Decimandi*, he may and muſt ſue for this in the Spirituall Court, and ſhall recover it there. *Co.*11.16.

And if the party dye before the Tythes be recovered of him, the Parſon, &c. may ſue his Executors or Adminiſtrators, and recover the ſame Tythes of them. But it ſeems he may not ſue them for the treble damages upon the Statute. But *Quere* whether perſonall Tythes be recoverable from Executors or Adminiſtrators, for it ſeems to me not, but that it is in the nature of an Action perſonall which dyes with the perſon. *F.N.B.*51.6. *H. et Trin.*9. *Iac.*

If any perſon with hold or ſubſtract of their perſonall or mixt Tythes or offerings, and ſhall not juſtly and fully pay, and yeild them according to the courſe and cuſtome of the place and Pariſh, the party grieved (be he Lay or Eccleſiaſticall,) may complaine to the Ordinary of the Dioceſſe, and he ſhall order them. And if the Defendant there appeale from that Judge, he may compell him by Eccleſiaſticall cenſures, to pay the other his coſts in that ſuit, taking ſurety of the other to repay it, if it fall out againſt him in the end. And if he refuſe to abide the ſentence of the Court, the party may by the aide of two Juſtices, have him enforced to it (as before.) Or els the Eccleſiaſticall Judge may Excommunicate him, and after notice and denomination thereof in the Pariſh Church upon a Certificate thereof after forty dayes, he may have out againſt him an *Excommunicato capiendo. Stat.*32. *H.*8. *cap.*7. 2 *Ed.*3 *cap.*13.

But in all theſe caſes a Parſon hath no remedy for any of theſe Tythes, unleſſe he be lawfull Parſon, and full Incum-

bent, And therefore untill Induction he cannot sue for Tithes nor after deprivation, or when for Symony he is disabled or when he hath not read the Articles of Religion at his first coming according to the Statute of 13. *Eliz. c* 12

And in all cases where he is lawfull and compleat Incumbent he may not sue for Tythes where either none are due, or the partie of whom he doth require it, is discharged, for if he doe, the party may have a Prohibition out of the Court of Kings Bench, or Common Pleas, and stay his Suit in the Spirituall Court, upon a suggestion made to the Court of the Truth, if the case in writing which must be delivered with the Copy of the Libell to the Judge of the Court where the motion is, but then in this case, the party must see that he prove his suggestion to be true by two Witnesses at the Least, within six Moneths after the granting of the same Prohibition, or else the Parson may have a Consultation and reduce the Suit to the Spirituall Court againe. *See Prohibition.* 2. *Ed.* 6. *cap.* 13.

If a Lay man have a Parsonage Impropriate, and be dissesed, or ousted of it, he may have an Assise, *Ejectione firme*, or other remedy for it, as a man may have for other Inheritances. *Stat.* 32. *H.* 8. *cap.* 7

If an Ecclesiasticall Parson sell his Tythes, after they are severed, or in his Barne, he may and must sue for the money in the Temporall Courts, and cannot sue for this in the Spirituall Court, but it may be for a summe of money recovered or agreed to be paid him for his Tythes substracted, he may sue in the Spirituall Court. *Articuli Cleri.* 1. *cap.* 2.

If debate arise upon the right of Tythes wherein the right of the Patronage doth come in question, and the quantity of the same Tythes do come to the fourth part of the value of the Church: This must be decided in a Temporall Court, not in the Spirituall.

Avoidance or voidance.

It is the want of an Incumbent upon a Benefice:

And this is either in Law (*i*) when a man taketh more Benefices then one being incompatible (*i*) not quallified for them or in Deed (*i*) when the Incumbent is dead, or actually deprived. This is opposed to Plenarty.

A Church

A Church or Benefice presentative (as every Parochiall Church is supposed to be) may become void five wayes. 1 By Creation (*i*) when the Incumbent is made Bishop. 2 By death: 1 When the Incumbent is dead. 3 By Resignation (*i*) When the Incumbent in his life time hath resigned his Benefice to the Ordinary. 4 By Deprivation (*i*) When the Incumbent is by Judgement of Law deprived. 5 By Cession (*i*) When the Incumbent takes another Benefice being incompatible. And some call this last and the first, that is when an Ecclesiasticall person is created Bishop without dispensation, a Cession. And in both these cases, the first Benefice doth become void. And thereupon the King in the first case, and the Patron in the second, *Vnica vice* only, may present a new. *Coesuper Litt.* 120. *Termes of the Law. Litt. Brook* 494. 498. *Doct. & Stu.* 127.

Cession.

Resignation.

This word is most properly applyed to the giving up of a Benefice, and is *Where the Incumbent doth yeild up a spirituall Living into the hands of the Ordinary*: And is much like to a Surrender. *Termes of the Law.*

This may be made to the inferior Ordinary that did admit the Parson, or to the King which is the supreme Ordinary. *Plow.* 498.

Deprivation.

It is when a Bishop, Parson, Vicar, Prebend, &c: is deprived or deposed from his spirituall promotion for some offence he hath done, or for some matter in fact or Law. As if he be a miscreant, Schismaticke or a meere Lay-man that is presented he may be deprived for this. So if he have plurality of Benefices and be not qualified, or if he doth not subscribe to the Articles of Religion according to the Statute of 13 *Eliz. cap.* 12. or if he come to it by Simony, he may be deprived for these causes. *See Pluralities. Non Residence. Co.* 11. 98. *F. N. B.* 53. *Co.* 5. 58. 102. *Dyer* 273. *p.* 35. 129. *p.* 66. 346. *p.* 7. 353. *p.* 30. 293. *p.* 4.

By what means a Church may become void.

A Church may become void after it is full by divers other meanes then those before. As by divers misdemeanors in the Clerks admitted to such Churches either in their coming to, or after their taking of their Benefices, as by Symony, Plurality, *non* residence, &c. which see in their places. Also if any man shall give money or other benefit (more then due Fees)

to

he be made Minister or take Orders, and shall afterwards within 7 years accept any Benefice or promotion and be instituted, and inducted therein; that imediatly after induction or installation, the Church shall be void as if the incumbent were dead, and he that hath right to present, may present againe. *Stat. 31. Eliz. 2. cap. 6.*

A Church may become void by union also. For which read Union. *et Doct. & Stu. 116. lib. 2. chap. 31.*

A Church may become void by non-payment of Tenths. *For which, See Tenths.*

The next avoydance.

It is the grant of the next Avoidance in a Parsonage or spirituall promotion.

The nature of it.

This is grantable whiles the Incumbent is living, and is in the nature of a thing in Action, and therefore will not passe without Deed. But a present Avoidance, though it be not meerly a thing in Action; yet it is not grantable. And therefore if a Feme Covert be seised of an Advowson, and the Church become void, and the Wife dyeth, the Husband shall present. *Dyer. 26. 9. Ed. 4. 47. a. Coo. super Litt. 120. 14. H. 4. 12.*

Commendam.

It is a Benefice, that being it is voyd, is commended to the care of some sufficient Clerk, to be supplyed untill it may be conveniently provided of a Pastor. And the true originall of this, was for evident profit or necessity, and he to whom the Church is commended hath the fruits and profits thereof onely for a certaine time, and the nature of the Church is not changed thereby, but is as a thing deposited in the hands of him to whom it is commended, and he hath nothing but the custody thereof, which may be revoked, *Termes of the Law, Doct. & Stu. l. 2. c. 32.*

And this that Ordinary (as it seems) may and ought to do with any Benefice within his Diocese, to depute some body to serve the cure during the vacancy of it, *Doct. & Stu. idem.*

If the King make a Deane, or Parson Bishop, he may by a speciall dispensation enable him to hold his Deanery or Par-

sonage, by *Commendam*, all his life, and his Bishoprick also; but without such a dispensation, his interest is gone into his first dignity by Cession: See before, *Stat.* 25 *H.* 8. *cap.* 21. *Plow.* 498.

It is a corrupt contract made touching a spirituall promotion, when money or other reward is given or promised to help a man to it that hath, or would have it: And it is taken, *A Simone illo Mago, qui donum spiritus pecuniis emi putavit, Acts of the Apostles, chap.* 8. *vers.* 18, 19, 20. And if the party himselfe promoted do give the reward, or by assent precedent or subsequent be party or privy to it, he is sayd by the Law to be *Symonaicus*; but if the reward be given or promised by another without his privity, then he is sayd to be onely *Symonaice promotus*, *Coo. super Litt. f.* 120. *a. Lord Windsor & Lapthornes case, Pasch.* 17. *Jac. B. R.* *Simony.*

1. No man must for any sum of money or other benefit, or for any promise or agreement for any such sum or reward, directly or indirectly, present or collate any person to any Benefice or Ecclesiasticall promotion, or give or bestow the same for or in respect of any such corrupt cause or consideration, *Stat.* 31 *Eliz. cap.* 6. *What contract shall be said to be Symonaicall.*

This Law being *Pro bono publico*, shal be taken and expounded largely against the offence, and to suppresse it; and therefore doth not onely extend to Benefices with cure, but to Dignities, Prebends, and all other Ecclesiasticall livings. And not onely to rightfull Patrons, but to Patrons by wrong also, that get a Church by usurpation. And therefore if any rightfull or wrongfull Patron that hath such a Benefice for a hundred pound given to him by *A. B.* a Clerk, presents him to it, this is a Simonaicall contract within this Statute, and the Clerk a *Symonaicus*. So if another on the behalfe of *A. B.* had contracted with the Patron to give him any valuable reward for the presentation in the behalfe of the Clerk, without the consent or knowledge of the Clerk, yet this contract is within this Statute, and in this case he is *Symonaice promotus*. *Coo. super Litt.* 20. *a. Perkinsons case pasch.* 9. *Jac. Scaccario.*

As if he grant the next avoydance to *B.* and a stranger comes to *B.* and doth promise to him twenty pound to present

sent C. and he is presented according not knowing any of these things, this is Simony and so hath been adjudged.

It one come to the Patron whiles the Incumbent is sick, and promise him one hundred pound if he will present him after the death of the Incumbent (being now sick) but it is after agreed, that the grant of the next Avoydance shall be to a stranger, and he shall present, this is *Simony*. *Adjudge Winscombe versus Pulsten pasche. 14. Jac. Coo. B.* But if a man buy a next avoydance with an intent to present his sonne or his friend, and he do so, this is not *Simony*. *Adjudge Smiths case a. Jac.*

And so was the case of *Fowler* Parson of *Mushin Hamton*. The Lord *Windsor* being Patron of that Rectory during his non-age, granted the next Advowson to Doctor *Gouge*, and the Church being void, *Richard Fowler*, the Father of *Henry Fowler* gave three hundred pounds to Doctor *Gouge* to forbeare to present, and then *Richard Fowler* gets a Presentation from the Lord *Windsor* to his sonne *Henry Fowler*, who was thereuppon admitted, instituted, and inducted, neither the Lord *Windsor* nor *Fowler*, being privy to this contract. And yet it was adjudged Simoniacall, and that *Fowler* was ever disabled, and uncapable by this Statute. (f) And from hence it is that, If a villain purchase an Advowson in Fee, and the Church become void, and the Lord present for reward directly or indirectly as in the cases before to this Advowson, this doth not vest the Advowson in the Lord. (g) *Adjudge Coo. Idem. M. 41. 42. Eliz. Bakers case.*

Q. the difference betweene these branches, this and the last.

2 No man must for any such reward, in present or future directly or indirectly, install, admit, institute any person into any Benefice with cure of soules usuall and lawfull Fees excepted. *Stat. 31 Eliz.*

3 No Incumbent of any Benefice with cure of soules, shall corruptly exchange or resigne it, or take any money or profit for the same. *Stat. 31. Eliz.*

The fruit & punishment thereof.

In the first case, the Presentation so made as before by *Simony*, and the admission and institution thereupon are void, but before this Statute they were only voidable by Deprivation in the

the spirituall Court. *See the Statute of 31. Eliz. cap. 6.*

2 The Person so promoted is for ever disabled by Law to take or enjoy that Ecclesiasticall promotion (*a*) And no dispensation with a *non obstante*, nor new Presentation by the King himselfe can in this case make him capable of the same dignity againe. But by the Civill Law he was uncapable only where he was *Symoniacus*. And where he was *Simoniacè promotus*, he was to be deprived only. But now in both cases he is for ever made uncapable. And so was the opinion of the Judges in the Case of the Lord *Windsor*. (*a*) *Plow. Com.* 502. 2 *Ed.* 7. 6. *Lord Windsors case Co. super Litt.* 120. *a.*

3 Such persons as so shall give or take such summe, or make or take such promise shall forfeit the double value of one years profit of the same Benefice or dignity.

4 The parties may be punished by Ecclesiasticall censures, notwithstanding.

5 The Patron looseth his Presentment for the King shall present for this turne. But if it be a wrongfull Patron that doth present by Simony, then the true Patron doth not loose his Presentment, but he shall present upon this Avoidance *Co. idem.*

1 In the second case, 1 The Parsons so offending, shall loose the double value of one yeares profit of the Church or dignity. *Stat.* 31. *Eliz.* 2.

2 The Dignity is become void as in the last case.

3 They may be punished by Ecclesiasticall censures.

4 The Patron may present, as if the Incumbent were dead. *Stat.* 31. *Eliz.*

In the third case upon corrupt contracts in Exchanges and Resignations.

1 The giver and taker both shall loose double the value of the summe so given.

2 They may be punished by Ecclesiasticall censures.

And if the Ordinary before admission and institution of the Clerk upon the examination of him, do find that he gained the Presentation upon any such corrupt agreement, he may refuse to admit him, and justifie the refusall. *Old Book of Entries f.* 532.

Impropriation, or Appropriation.

It is the improper taking of Spirituall benefits by temporall men. As where any body corporate or private hath the right of a Parsonage or spirituall Benefice in themselves, and power also to take the profit thereof to their own use for ever, appointing only, and allowing a Vicar there to serve the Cure: And such a man is called a Proprietarie, that hath the fruits of a Benefice to him and his Heirs, or him and his Successors for ever. And this was at first permitted only to them that were Spirituall persons, able to administer the Word and Sacraments, as Bishops, Abbots, Pryors, and such like, and as was pretended for the increase of hospitality. And they were made by licence of the Pope, the King and the Ordinary to appropriate such Advowsons, and that the Bishops, &c. themselves should be Parsons, making a Vicar only to serve the Cure, and that there should be a Vicarage. But in time this was gotten by others also as Deans and Chapters, Nuns and Prioresses, and at last it grew from evill to worse, and Laymen got the same liberty, and hired Vicars for small portions to serve the Cure for them. See the Cases. *Plow.* 499 *Coo.* 11. 11. 3 *Ed.* 474. 29. *Ed.* 3. 10. *Dyer* 244. 267. 40 *Edw.* 328.

Proprietarie.

Upon the Appropriation of any Parish Church a convenient provision shall be made for the Vicar and the poore, and there shall be such a Vicar perpetuall canonically institute and induct, to say Divine Service, instruct the people, and use hospitality. *Stat.* 15. *R.* 2. *Cap.* 6. 4 *H.* 4. *cap.* 12.

An Appropriation may be by Prescription at this day: Or such an Appropriation (as it seems) may be made at this day *de novo* by the licence of the King, and consent of the Patron and Ordinary when the Church is voyd: But it cannot be made whiles there is an Incumbent to begin during his life. *Dyer* 267. 244. *Plow.* 499. *Coo.* 11. 30. *a. F. N. B.* 33. *k.*

And in this case if any cause be, a *precipe quod reddat* doth lie against the Vicar only without naming the Parson, for he alone is Tenant, and may have a *Juris utrum* or other action against the Parson, if his Endowment be ancient. *Dier* 267. *Plow.* 499.

It is where a Parsonage impropriate is become propriate again. *Termes of the Law.* *Dispropriation.*

If a Parsonage impropriate did belong to a Corporation, & the Corporation is dissolved, by this the Impropriation is gone, and the Church is become propriate again. So if the Advowson be recovered by an ancient title before the Appropriation. So if the Parson present another to the Advowson, and his Presentee is admitted, instituted and inducted, by this the Impropriation is gone. But against his will it cannot be disappropriated. And to such Impropriations as came to the King by 31. *H.* 8. one cannot present no more then to one Acre of land. *Plow.* 497. *Coo.* 2. 49. *Plow.* 501. *n.* 18. *Jac. Co. Baperach. Inst. & Inst. Warburton.* *Where it shall or may be, or not.*

Is is the combining of two Churches together in one, and is sometimes Reall when it is perpetuall whosoever be incumbent, or Personall, when it is for the life of the Incumbent only. There is another kind of union, as when one Church is made subject to another, and one man Prelat of both; or when a conventual Church is made a Cathedral Church. *Stat.* 37. *H.* 8. *cap.* 21. *Union, or Consolidation.*

By the Common law where there are two Churches, and one is not able to find the Cure, the Ordinary by consent of the Patrons may unite them, & make a Consolidation without the Kings Licence, and if one man be Patron of both Churches, he shall have the sole presentment; and if there be several Patrons, they shall present by Turn. 40 *Ed.* 3. 28. 50 *Ed.* 3. 27.

There may be a union of two Churches in one now by the Stat. of 37 *H.* 8. *cap.* 21. but with these limitations.

1. They must have the Kings Licence for it.

2. The Patrons that have the Fee-simple, the Ordinaries and Incumbents of both places (being all of full age) must agree to it.

3. The agreement must be in writing.

4. The Churches must not be above a mile a part.

5. One of them must not be above the value of 6 *l.* in the Kings Booke. But a union may be made of two Benefices though the one doth exceed 8 *l. per Annum*, if the Patrons and

and Ordinary agree, or the King give his Licence before it be done, or allowance afterwards. *Stat.* 37 *H.* 8. 40 *Ed.* 3. 28. 38 *H.* 6. 22. 6 *H.* 7. 13. *Austins case adjudg'd.*

Ægistment, & Pawnage.

This word *Ægistment* and pawnage which it seems is of the same signification with *Ægistment*, do sometimes signifie a kind of Common or feeding of Cattell which one man hath in another mans ground, or the going of my Cattell in another mans Pasture, and sometimes it doth signifie a kind of duty or summe of money to be done or payd for the common and feeding of another mans cattell, or forth going of another mans cattell on my ground, and is for the most part applyed to Forrests and Parks, and such like places, where in many places they claym under this word a little summe of money of every one for every Beast or Pig that shall go within a certain place. And these are had and claimed sometimes by Grant, and sometimes by Prescription. And it seems also sometimes to be taken for the profit of a ground, and that by the grant of the Ægistment or pawnage of a ground, is meant nothing else but *Vesturam* or *Herbagium terræ*. But quære of these things, and see *Dyer* 80. *p.* 59. & 85. *p.* 40. *Old book of Entries* 644. 660. 655. *Crompt. Jur.* 192. *a.*

Authority.

It is a power to do something. And this power in some cases is by the Common-law. As power is given to a man to enter orderly into an Ale-house or Inne: to demolish houses in a Citie, to prevent the increase of a Fire, or to fortifie it in a time of Siege. And in some cases it is by the Statute-lawes. As power is given to a Tenant in tayle, or in right of his wife, to make leases for three lives, or 21. years: So power is given to a Tenant in Capite to devise two parts in three parts of his Capite lands. *Dyer* 36. 12 *Edw.* 4. 8. *Perk.* 192. *Co.* 1. 121. 173. *Plow.* 290. *a.*

This power also is sometimes given by one man to another. And this is sometimes by word, and sometimes by writing. That which is by writing is either by Precept, Writ, Warrant, Commission, letter of Attorney, Proviso in a deed to make leases, revoke uses, or the like. *See the examples.*

The Nature of it.

The nature of this is such (1) that it is not grantable over by him that hath it. 2. It must be strictly pursued. 3. It dyeth

eth with the parties, and doth not go to Executors, for which see the cases beneath. *Cro.* 8146.

This hath much affinity with the former; For it is defined to be. A leave & liberty to do or omit something that otherwise ought not to be done: or omit something that otherwise ought to be done, but now by this means is become lawfulll and justifiable, and may be pleaded in defence and excuse of the commission, or omission, if the party be questioned for it. And it is distinguished and regulated much like to the former, and therefore the rules and cases of one are in many cases appliable to the other: This therefore is also sometimes said to be given by the law: As for a Traveller to enter into an Inne or Ale-house: a Lessor to enter into the house leased to view the reparations and decays, and sometimes it is given by the party, by one man to another: And that sometimes in writing, and sometimes by word only. *Licence.*

And both these ways it is somtimes generall, & sometimes speciall. There seems then no reall difference between Authority & it, but that they may be (as they seem to be) confounded and taken one for another: Howsoever, Licence is most commonly applyed to an act done that otherwise had been unlawfull, and by this the party that did it, is excused, but Authority to acts that are lawfull, which thereby are justified by the doer: and this in some cases is more compulsory, then the other. *Bro. trespass* 97. *Cop.* 11. 11. 9 *Ed.* 4. 4. *Bro. Licence* 79 *Fitz. trespas* 92.

The Licences that are had from the King, especially those that are to priviledg a man from the danger of a penall law, are called Dispensation; For a Dispensation is a kind of Licence to transgress, or exemption from the danger of a penall Law, which the King in some speciall cases to avoid inconvenience by his prerogative doth and may give or grant to some person. Also the Licences of Ecclesiasticall, persons that are somewhat of this nature, and they have by a derivative prerogative from the King, are sometimes called by this name. But the most proper and peculiar Term to set forth this kind of dispensation is a faculty which is defined to be a priviledg or especiall power or Licence granted unto a man by favour, *Dispensation.*

indulgence,

indulgence, and dispensation to do that which by the Law or otherwise he could not do; As to eate Flesh upon the dayes prohibited, to hold two or more Benefices, or the like. And that dispensation which is granted to a Clerk, that being uncapable, is made capable, and *de facto* admitted to it, is called a *perinde valere*, which name it hath from the words which make the faculty as effectuall to the party dispensed with at the time of the Admission. And for the granting of these faculties there is a speciall Officer appointed under the Arch-Bishop of *Canterbury* called the Master of the Faculties. *Cro. 11. 86 88. Stat. 25. H. 8. c. 21.*

Perinde valere.

Master of the Faculties.

An Authority given by the Sheriffe to his Bayliffe to arrest is good, though it be an Authority derived out of an Authority.

A verball authority from a Justice of Peace to any man to apprehend another to find Sureties for the Peace, when he is there present, and doth break the Peace before him is good.

What authority shall be said to be good.

The King in some cases may authorise a man to do a thing which is *malum prohibitum* only, and not *malum in se*. *1 H. 7. 3. 3 H. 7. 15. 11 H. 7. 11, 12. vide infra.*

Where a Justice of Peace by word commands one being present to arrest another which is also in his presence, this is good, and is reputed as an arrest made by the Justice himself, *14 H. 7, 8, 9.*

In case of Ryotors, a Justice of Peace may by word command his servants to arrest them in the absence of the Justice. *14 H. 7. 9, 10.*

A man that hath his authority by Record, cannot grant it over without writing, unlesse it be to arrest a person that is present, as in the cases before. *10 H. 7. 17.*

An authority given by a Bayliff to another Bayliff to arrest a man is not good: So if one have power to make Leases and grant it to another, this is not good; For regularly, neither Licences nor Authorities are grantable over. *Poulton de pace 19. (b)*

What not.

A verball authority onely from a Sheriffe to arrest a man is not good; *9 rep. 69.* whether it be to a Bayliff errant, or other speciall Bayliff. *Fitz. Faux imprisonment 3. Keb. 86. (b) 14 H. 7, 8, 9.*

A verball

A verball authority only from a Justice of Peace to arrest a man that is absent is not good. *Wadden versus Bookyr, M. 13 Jac.*

A verball authority only to surrender the lease for years, is not good, though he deliver him the Lease also. *Sleigh versus Bateman, Hill. 17. Eliz. B. R.*

A verball authority to deliver Seisin is not good without writing: Neither is an authority in writing to deliver Seisin after the death of either of the parties good, for it is against Law. *Coo. Litt. fol. 52.*

An authority given to another to do that which he himselfelf cannot do, is not good. *Quod per me non possum, non per alium. Coo. 11. 87.*

A verball authority by a Justice of Peace to a Goaler, whereby a Prisoner is sent to Goale, it seems is not good. It is safe for Justices of Peace to send their Warrant in writing, and therein to insert the cause of the commitment. *Wadden v. Bakyr.*

An award that the parties shall obey the arbitrement of an other is voyd, for power cannot be assigned, *8 E. 4. 19.*

A verball authority to receive seisin is not good without Deed. *Co. s. Lit. 48.*

If a *Capias* be directed to the Sheriff to arrest a man which doth dwell within a Franchise, the Bayliff of the Franchise cannot arrest him without a Warrant from the Sheriff in writing. *Vide Commandement, infra.*

Although it be a rule of Law, that every authority that is given by act of Law, or act of the party, must be strictly pursued, or else it is said to be done without authority, yet when more is done, or when it is done by more persons then be in the authority, in many cases it is good enough, and it shall be say a sufficient pursuit of the authority, notwithstanding. As whereby the Statute of 32 *H.* 8. the Tenant in Capite hath power to devise two parts in three parts of his Land, yet if he devise all, it is good for two parts. An assignment of debt was to the Quere, provided that if the Lord Treasurer, or the Barons of the Exchequer, or any two of them do revoke, *&c.* And after three Barons do revoke it, this

When an authority is said to be wel pursued.

this is good. *Omne majus continet minus. Plow.* 393.

If a greater number of persons do a thing then are appointed by a Statute (unless the Statute do purposely restrain the number) it seems it is well enough done, as where more do sit in the Star-chamber then are mentioned in the Statute of 3 H. 7. *cap.* 1. *Quando plus fit quam fieri debet, videtur & id fieri quod fieri debetur.*

If a Statute give power to make Leases, so as they do not exceed three lives, or 21. years (as the Stat. of 32 *H.* 8. is) In this case, If one lease for two lives, or for 99. yeares, if three lives so long live, this is a good pursuit of the authority; But if the word of the Statute be, that they shall make Leases for three lives, or 21. yeares, in this case, a Lease for twenty yeares, or two lives is not good. *Co.* 6. 33. 8 Ed. 70.

If one make a lease for life, and a letter of Attorney to deliver the possession to the Lessee, and the Attorney deliver possession to the Attorny of the Lessee, this is a good pursuit of his authority. *Fincher's ry.* 66.

If a Deed be made of two acres, and a letter of Attorney to deliver Seisin in both *secundum formam chartæ*, and the Attorney enter into one acre only, and give seisin *secundum formam chartæ*, this is a good pursuit of the power, & a good livery for both; and that though he did not deliver it to one in the name of both: So when a Feofment is to two or three, and the warrant to give livery so, and he do it to one *secundum formam chartæ*, this is good to both, and yet the absent party may waive the livery. *Co. super Litt.* f. 52.

If one devise his Land to his Executors to be sold, and one of them dye, the surviving Executor may sell it. *Co. super Litt.* 181.

If a *Venire Facias* be sent to four Coroners, to impannell and return a Jury, and one of them dye, and the Survivors execute it, it is good. *Idem.*

If the Sheriff upon a Writ make a Warrant to four Bayliffs joyntly, or severally to arrest, and two or three of them arrest the party, this is a good pursuit of the Authority. *Pasche* 45 *Eliz. B. R. King & Hobbs.*

If

If one give another an Authority to make a claime, and he come to any part of the Land, and there make claime, &c. in the name of his Maſter, &c. this is good. So if the Maſter ſay to his ſervant, that he dares not come to the Land, or any part of it, to make his claime, &c. and that he dare approach no neerer to the Land then ſuch a place called *Dale*, and command his ſervant to go to that place, and there make his claim for him: this is good, although it may be the ſervant durſt to have gone further. So if a man be ſick, and not able to go out of doores, and have cauſe to enter; and he command his ſervant to go to the Land and make his claime for him: and the ſervant fearing, &c. dareth not go to the Land, but goeth as neare as he can or dare, and there claimeth for his Maſter; this is good. *Impotentia excuſat legem. Litt. ſect.* 433. 434.

And for the moſt part it is true; where a man doth that which he is authoriſed to do and more; there it is good for that which he had authority to do, and void for the reſt. *Coo. ſuper Litt. fol.* 252.

And therefore if a Letter of Attorney be to make livery to one, and he make livery to two, tis good to him to whom the Warrant extends, and void to the other. *Perk.* 39. *a.*

So if it be to make livery of Warrant, and he makes livery of Warrant; and Bargaine, tis good for Warrant: *Ibid.*

If a Letter of Attorney be to deliver Seiſin to two and one of them dyeth, and he makes livery to the other, tis good to him for the whole, *Perk.* 39. *a.*

If a letter of Attorney be thus. I make *A.* and *B.* my Attorney and Attorneys for me, and in my name to enter on the Land, and there to deliver the writing as my Deed, ratifying and confirming whatſoever my Attorneys or either of them ſhall do concerning the premiſes, and one of the Attorneys doth, and it was held good by two Judges in *B. R.* 11. *Car.*

Regularly when a man doth leſſe then the commandement or authority committed to him, there (the authority being not purſued) the Act is void, unleſſe it be in ſome ſpeciall caſes *ſupra.* So where he doth it otherwiſe then his Authority doth direct him. And therefore an Authority cannot be Apportioned: As where the ſtatute of 32. *El.* 34. doth give

a man power, that is seised of Soeag and Capite Land, to devise or dispose two parts for the benefit of his Wife, &c. and a man being seised of two Acres of Capite Land, and one in Socage, dispose his two Acres to such purposes: now he cannot devise the other Acre at his death, and if he do it is voyd. *Coo. super Litt.* 258. *Coo.* 3. 34. 2. 26.

when not.

So likewise is the Law for the power of Commissioners upon the Stat. of 13. *Eliz. cap.* 7.

If two Attorneys have a joynt power to do any thing, and one alone doth it in the name of the other, and him, this is not good. As if a Letter of Attorney be made to two joyntly to take livery of seisin and one of them doth take it, this is void. *Coo.* 5. 94. 95. *& super Litt.* 49. *b.*

If an Authority be given to three to do any thing joyntly or severally, and two of them do it in the absence of the third; (2) or one of them and a stranger do it; this is not good. *Coo.* 5. 90. *Dyer.* 61. (2) *Norths case M.* 4. *Jac B.R.*

If one willeth that *A.B.* and *C.* his Feoffees shall sell his Land, and one of them dye, and the survivors sell it: or if he willeth it shall be sold by the advice of *A.* and *A.* dye and they sell it without advise, this is not good. *Dyer* 177. 190. 214.

If in the Starre Chamber, the Chauncelor, Treasurer, and Gardian of the Privy Seale, or two of them do not take with them a Temporall Lord, a Bishop, and the two chief Justices, according to the Statue of 3 *H.* 7. *cap.* 1. Their judgments are not good. 3 *H.* 7. *cap.* 1. 8. *H.* 7. *p. ultimo* 16. 233.

If one Auditor commit a man that is an Accomptant to prison, upon the Statute of *Westm.* 2. *cap.* 12. This is not good nor warrantable *Plow.* 394.

If a Commission be to eight persons joyntly to heare and determine, seven of them cannot do it. *Plow.* 394.

If a Warrant be to an Attorney to deliver Seisin generally, and he do it in view, this is no pursuit of the authority, and therefore void. *Coo. super Litt. fol.* 52.

If a Writ be to the Sheriffs of *London* to do any thing, and one of them be dead, the other cannot execute it. 14. 435.

If

If any authority be to deliver Seisin to *V.* or *S.* and to make livery to *V.* and *S.* this is not good, nor pursuant of the Authority. 11 *H.* 7. 13. *Feoffments B.* 643.

If I command one to make a Feoffemnt in my name in Latine according to a Coppy shewed him, and he make it in English or French, this is not good. 10. *H.* 7. 9.

If one Sherriff be commanded to hang a man, and he behead him, this is not good, but fellony in the Sherriff. 35. *H.* 638.

A is disseised of Bargain and Warrant. A makes a Warrant of Attorney to *B.* to enter in both, and to make Livery there if *B.* enters in Bargaine only and make Livery *secund. form. Chart.* tis a void Livery. *Co. Lit.* 52. *a.*

If a Letter of Attorney be to makes livery after the death of a stranger, and he makes livery in his life, tis void 40. *Ass. p.* 38.

If a Letter of Attorney be to deliver Seisin to *H.* upon condition, and the Attorney deliver it absolute, this is void. 11. *h.* 4. 3. *a.*

If a Letter of Attorney be absolute, and the Attorney delivers Seisin upon condition, this is naught. 12. *Ass. p.* 24. *adjudged.*

where an Authority is revocable, and when it shall be said to be determined And when not

All authorities for the most part are revocable and may determine by the Act of God (*i*) the death of him that gives it, or the death of him to whom it is given: or the Act of the party that doth give (*i*) when he doth actually revoke it himselfe before the thing be done. And therefore if an Authority be given to two or more joyntly to do a thing, and one of them dye, nay in this case the Authority is determined. And if I deliver money or other thing to *I. S.* to deliver over or to give a way, and before it be done I forbid him to deliver; in this case his Authority is determined. *Dyer* 190. *Co.* 5. 90. *Dyer* 190.

But if there be an interest coupled with the Authority, there it will not, nor can be countermanded by any such Act of God or the party; As where one doth devise his Land to his Executors untill his sonne be of full age, and that they shall sell it, in this case they, or some of them dye, yet the rest may sell it, And so in all like cases. So where an Authority

is once executed, it cannot afterwards be revoked by any meanes. *Dyer* 210.p. 24.*Perk.fol.* 105.*Coo.*5.90.*b.*

An Authority also may determine by other Accidents. As if an Administration be granted to me during the minority of foure Infants, and one of them become of full age, it seemes in this case the authority is determined. *Coo.*5.9.

Notice. See more of this point in countermand; and note that alwayes in case of Countermand of authority, there must be notice, otherwise the countermand is not good. And therefore if a Factor, Attorney, or the like, or any other Arbitrator or Commissioner have a Countermand made them, whereof they have no notice; this doth not determine their Authority. *Coo. super Litt* 55.*b.Coo.*8.82.21.*H.*6.29.

See for the Authority of Officers, Arbitrators, Auditors, Attorneys, Bailifs, and such like in their severall Titles.

1 Commission. It is the Warrant or Letters Patents from the King testifying that one or many have some authority in a matter of trust committed to their charge. As to heare and determine any cause or causes, to examine Witnesses, Purvey and take up provision for the King, or the like. And they that are thus trusted, and in authority by virtue of this Commission are called Commissioners. *Termes of the Law* 11 *H.*4.*cap* 28.

Qualities. And some of these are to heare and determine offences and other matters and require no Returne. And some are to enquire, or examine, and to certifie what is found, and they must be returned. And some are to seise Lands, Goods, &c. *Stat.*4.*H.*4.*cap.*9.

2 Where Commissions are grantable, and what things may be done by Commission, or not.

By Common Law. By the Common Law Commissions are grantable in divers cases, and almost in any case by those Courts, that proceed by that course of Examination of matters by Commissions: Also all the great Officers Judiciall and Ministeriall of the Realm are made by Comission. By this means are & may Treasons, Felonies, and other offences be examined, discovered, heard and determined. By this meanes may and are Oathes, Conusance of Fines, Offices be found, Subsidies and Fifteenths be taxed, and many other things be done as occasion shall re-

quire,

quire, as to examine witneſſes, take Anſwers and the like. *Broo. Commiſ. in toto. Stat.* 35. *H.* 8. *cap.* 2. 2. *et* 3. *Bl. & Mu.* 10. *R.* 2. *cap.* 1.

But Commiſſions may not be granted againſt Law, as to take and impriſon mens bodyes, to enter upon their Lands, or take their goods without order of Law, and if any ſuch be granted they are void, and do create no Authority. *Broo. Commiſſion.* 3. 15. *Juſtices* 6.

By Statute Lawes alſo Commiſſions are grantable in divers caſes, and divers things may and are to be done by Commiſſion. (*a*) As the finding of Offices after the death of the Kings Tenant. (*b*) To enquire of the imployment of Lands or monyes, that have been given to publique and charitable uſes, and to ſet down orders for it. (*c*) To examine parties and witneſſes for any ſummes of money that have been gathered for houſes of Correction, or Stocks to ſet poore on work, and to get it into their hands. (*d*) To heare and determine pollicies of aſſurances made amongſt the Merchants (*e*) To inquire of the miſdemeanours of Purveyors in taking for the Kings proviſion (*f*) To inquire of a Riot that hath been done, and the neglect of the Juſtice of Peace and Sheriffe therein. (*g*) To inquire of ſervants that imbeſill their Maſters Goods after their death, and to make Proclamation that they appeare and anſwer it. (*h*) Alſo a Commiſſion may be had to grant Licences and faculties in ſome caſes (*i*) Alſo Commiſſions may and muſt be had to determine Appeales from the Archbiſhop, or the Admiralls Court (*k*) Alſo to heare and determine offences done upon the Sea (*l*) and Treaſons done beyond the Seas (*m*) And to heare and determine offences confeſſed before the Kings Councell, (*n*) And to enquire of the Account of the Kings Officers and Accomptants which they have made in the Exchequer whether the ſame be right or no (*o*) And to enquire heare, and determine of all matters againſt the Kings true and ſafe conducts upon the maine Sea. (*a*) *Stat.* 1 *H.* 8. *cap.* 8. (*b*) 43 *Eliz.* 2. *cap.* 4. (*c*) 39 *Eliz. cap.* 4. (*d* 43 *Eliz. cap.* 12. (*e*) 36 *Ed.* 3. 4. (*f*) 2 *H.* 5. *cap.* 8. (*g*) 33 *H.* 6. 1 (*h*) 25 *H.* 8. *cap* 21. (*i*) 25 *H.* 8. *cap.* 19. (*k*) 28. *H.* 8. *cap.* 15. (*l*) 35. *H.* 8. *cap.* 2. & 5. *Ed.* 6. (*m*) 33 *H.* 8. 23. *cap.* 11. (*n*) 6. *H.* 4 *cap.* 3. (*o*) 2 *H.* 5 *cap.* 6.

By Statute Law.

For:

Commission of Sewers.

For reformation of Weeres and Banks, and to prevent the innundation of great waters, A Commission may be had out of Chancery, called the Commission of Sewers. *Fo.* 10. 138. The forme whereof, and all that doth concern it, and the execution of it. See in *stat.* 6. *H.* 6. *cap.* 5. 8. *H.* 6. 3. 23. *H.* 6. 9. 23. *H.* 8. 3. 3. & 4. *Ed.* 6. 8. 13. *Eliz.* 9.

Also commissions are grantable, and have beene made and had to take the Oath of Supremacy: To enquire and compound for first fruits. To enquire of the valew of each living spirituall, and the deductions and payments out of the same. And to enquire of *Chantrie* Lands. And to end Suits for small debts in the City of *London*. *Stat.* 5. *Eliz.* 1. 26. *H.* 8. 3. 26. *H.* 8. 3. 1. *Ed.* 6. 13. 3. *Jac.* 15.

But no commissions of generall Inquiries within Seigniories shall be had or sued forth. *Stat.* 34. *Ed.* 3. *cap.* 1.

No commissions shall be granted by temporall Judges to enquire of the proceedings by spirituall Judges. *Stat.* 18. *Ed.* 3. *cap.* 6.

By whom they they must be granted or not.

All the commissions for the great offices of the Realme are made by the King under the great Seale of *England*. So all commissions of *Oyer* and *Terminer* of the great offences of the Kingdome by the common Law. And so all other commissions to examine Witnesses, take the Cognizance of a Fine, or to do any other matter for the furtherance of Justice in any matter whatsoever comes in the Kings name though it be grantable by the court where the matter is depending *Ex officio*. *See the Commissions.*

All the commissions come in the Kings name: The commissions for finding of Offices come out of the *Chancery*: The Chancellor of the Dutchye of *Lancaster*, for the Lands within the Dutchye under the Seale of the Dutchy: the Lord *Chancellor* under the great Seale of *England* doth grant commission for charitable uses. The Lord *Chancellor* of *England* doth grant the commision out of the *Chancery* to enquire of the money gathered for the poore: So also he doth that for the policy of assurance: The commision against Purveyors is granted as other commisions are out of the *Chancery*: And so also is the next about a Riot: The commission against ser-

vants

vants for goods of their Masters imbesled, is granted by the Lord Chancellor, with the advice of one of the chief Justices, and chief Baron, or two of them: The Commission for granting of Faculties is granted as other Commissions are granted: So likewise the Commission to determine appeals: In all the three cases of the tryall of Offenders, the commission is granted by the King as other commissions are: The commission to examine the Accompts of the Kings Officers it seems is to come out of the Exchequer: And the commission for safe conducts is granted by the King and the Admirall. *See the Stat. before. Coo. 9 71. a.*

To whom they may and must be granted, or not. And who may be Commissioners.

The Commissions for the great Offices, and for *Oyer* and *Terminer* of Officers are grantable to any person that is not disabled by some special Law to whom it please the King: And other Commissions out of the Courts in their ordinary proceeding are grantable to whomsoever the Courts will appoint. *Stat. 3. Jac. 5.*

Any may be Commissioners, unlesse by some Statute they be restrained. In case of finding of Offices, none may be Commissioners but such as have forty Marks *Per Annum* of Land: In the Commission for charitable uses, the Bishop of the Dioceſſe if there be any, and his Chancellor, and other sufficient persons whom the Lord Chancellour shall name, so that there be four at least: In that for the enquiry of money gathered for stocks to set the poor on work, whomsoever the Lord Keeper will name may be Commissioners: In that for the policy of Assurances, the Judg of the Admiralty, the Recorder of *London*, two Doctors of the Civill Law, two common Lawyers, & eight grave Merchants, or any five of them must be Commissioners, and may execute it. In the Commission against Purveyors, one of the Kings house, and two other sufficient men shall be Commissioners, and any two of them, and they may execute it: In the Commission to enquire of the Riot, *&c.* any may be Commissioners whom the King or his Chancellor will appoint: The Commission or writ against servants is to the Sheriff of the County: In the Commission for granting of Faculties, two spirituall Prelats or others the the King shall name must be Commissioners: In the Commission

miſſion for tryall of Appeals, there muſt be ſuch Commiſſioners as the King will name: In the Commiſſion for the tryall of Offenders; in the firſt caſe it muſt be to the Admirall, his Lieutenant or Deputy, and three or four ſuch as the Lord Chancellor ſhall name: And in the ſecond and third caſe, to ſuch perſons as the King ſhall appoint: the Commiſſion to examine the Accompts of Accomptants is grantable to whom the King or his Barons of the Exchequer will name: And the Commiſſion for ſafe conducts may, and muſt be granted to the Conſervator of the Truce, and two men learned in the Law. *See the Statutes before.*

All Commiſſions to enquire of Articles ſhall be made to the Juſtices of the one Bench or the other, or Juſtices of Aſſiſe, or of the Place, and other worthy men of the countrey. *Stat. 42 Ed. 3. cap. 4.*

In every Commiſſion of the Peace for Gaol-delivery, there muſt be two men of the Law of the County-Commiſſioners to deliver the Priſoners. *Stat. 17. R. 2. cap. 10.*

The power, authority, and duty of ſuch Commiſſioners ſo made.

The power of Commiſſioners is to do what by their commiſſion they are commanded to do, and therein alſo is included authority to do all that without which that other thing cannot be done: And their duty is firſt to receive the Commiſſion, and then to execute it, and therein to purſue the authority and direction of the Commiſſion, and faithfully to perform the effect of it: And then to make a due and a true Certificat or Return thereof when the Commiſſion doth ſo require: But if the Commiſſion be againſt Law, the Commiſſioners are not bound to accept or obey it, *vide ſupra.* And if they doe any thing they have not authority for by their Commiſſion, it is void, and for ſo much it is as if no ſuch Commiſſion were. *Coo. ſuper Litt. 157. b. Coo. 2. 25.*

The authority of Commiſſioners by Statute-laws is ſuch as the Statutes give them, and their duty ſuch as the Statutes preſcribe: As in the caſe of finding of Offices, they are to ſit in open places, and let every man to give evidence that will: In the caſe of Charitable uſes, they muſt by a Jury, and all other ways they can, having the parties and witneſſes before them, labour to ſearch out the matter, and ſet down orders

for

for the employment of the gift, and certifie their doings in Chancery, and if any be grieved by their order, he muſt complain there: In the laſt caſe of Charitable uſes, they may compell by attachment of their goods or bodies, any to accompt, they ſhall ſuſpect to have any ſuch ſums in their hands, and force them to pay to them what they find by ſale of their goods, or impriſonment of their bodies: In the caſe of Aſſurances between Merchants, they may hear and determine the matters, and for that purpoſe call, and compell the parties and their witneſſes before them, and impriſon them who will not obey their orders: And if any be grieved by their Order, he muſt complain in Chancery: In the caſe againſt Purveyors, they may and muſt examine their doings, and puniſh their faults: In the caſe of the Riot and neglect of Officers, they are ſpeedily to enquire of the Riot, and of the neglect of the Juſtices or other Officers in their duties, and to certifie the ſame into the Chancery. In the commiſſion againſt Servants for imbeſſelling, the Sheriffe is to make open proclamation according to the direction of the ſame commiſſion, and to return the ſame: In the commiſſion for granting of Faculties, they may and muſt grant Faculties under their Seale, in ſuch manner and order as the Arch-Biſhop ought to grant them: In the caſe of Appeals, they are to heare, and definitively to determine them: In the caſe of Tryall of offenders, the Commiſſioners are to proceed againſt the offenders by indictment, arraignment, and ſuch an order of tryall as by Law in ordinary caſes is uſed: In the Commiſſion for to examine the Accompts of Officers, they muſt enquire and certifie to the Court the Receipts and Diſburſments: In the commiſſion of ſafe conducts, the commiſſioners may, and muſt heare and puniſh all offences great and ſmall, done againſt the truce and ſafe conducts upon the mayn Sea, out of the body of any county. *See the Statute before.*

Commiſſioners in divers caſes have power to make Bargains, Sales, Feoffments, and Leaſes of other mens Lands, and their acts therein are good and binding. For which ſee *Stat* 13 *Eliz. cap.* 7. 2 & 3 *Ph. & M. cap.* 1. 1 *Ed.* 6. *cap.* 14. 23 *H.* 8. 2. 5. 34 *H.* 8. 4. 43 *Eliz.* 2, 3, 4.

Their faults & punishments.

The faults of Commissioners in generall are the omission or commission of any thing against their duty set down before:

1 To refuse a Commission being sent unto, and offered them, unlesse it be in case where a man is authorized by a speciall Law to refuse it, as the Statute of 1 *H.*8. *c.* 8.

2 To do any thing against, or besides the contents thereof, or to neglect to do any thing commanded and requred by it.

3 Not to return or certifie it when it is executed, and where the nature of it is such as it doth require a Return. *Coo.* 2. 17. 25. 80. 9. 77. *Stat.* 7 *H.* 4 *cap.* 11. *so was it held in* 2 *Jac. B. R. Stat.* 4 *H.* 4. *cap.* 9. 1 *H.* 8. *cap.* 8.

If a Commissioner to examine witnesses, will not suffer a witnesse to declare the whole truth of matter pertinent to the question, and pursuing the Interrogatory: or if after he begin to examine, he have secret conference with the partie, and take new direction from him: or before publication discover to either party any thing which is deposed on either side: or take gifts to incline to either side: or return not the true depositions: or make not return of them at all, all these and such like are misdemeanors punishable. *Coo.* 9 71. 40 *A St.* 83. *F.N.B* 110. *Moors case* 2 *Jac. B. R.*

And for all these defaults and misdemeanors in Commissioners, where by the Law there is no certain punishment set down, the offenders may be punished by Fine and Imprisonment in the Star-chamber; or in some cases in the same Court out of which the Commission did issue: And where they do exceed their authority in most cases they may be punished, so as if none such Commission were made. *Coo.* 9. *Stat.* 4. *H.* 4 *chap.* 9. *Moor*, versus *Foster.*

But where any Statute doth set down any certaine punishment, there the offender must beare that also: As a Commissioner to find an Office, if he have not forty Marks *per annum* of Land, looseth 20 *l.* And if he sit in secret places, or hinder the free giving of evidence, he looseth 40 *l.* and so of others. 2 *Jac. B. R. Stat.* 1 *H.* 8. *cap.* 8. 25 *H.* 8. *cap.* 10.

When a Commission shall be said to be determined, or not.

A Commission that is well made and granted, may determine and become void by divers means and wayes: As sometimes

times by the granting of a new Commission, and that may be when it granted to the same persons; or when it is granted to others. As if a Justice of the Common-pleas be made Justice of the Kings Bench, though it be but for one time, and he surrender it the morrow after, the former Commission is determined: But if such a Justice be made chief Baron, Justice of *Oyer* and *Terminer*, or of Gaol-delivery, this doth not determine the Patent. *Litt. Brooke, sect.* 498. *Stat.* 13 *Eliz. cap.* 9. *By a new Commission.*

If the King grant to a Major and Cominalty and their Successors to be Justices in such a place, and after grant to others to be Justices there; or if the latter Commission be granted to such as are dead, or it be void for any other cause, in these cases the former Commission doth continue: But if the latter Commission be granted but to one, and the first to four: or it be only *hac vice*, it doth determine the former Commission. *Litt. Broo. sect.* 569.

If a Commission of *Oyer* and *Terminer* be granted to some persons, and after a Commission of Gaol-delivery is granted to others, this latter doth not determine the former, for these may stand together; but when the latter is contrary to the former, the former is determined. As if there be a Commission of the Peace is granted to some, & after another Commission of the Peace granted to others, this doth determine the former. But in all these and such like cases, there must be notice. *Litt. Brook. sect.* 474. 509. *& Broo. Commission* 2. *See Notice.*

If a Commission be granted to some persons to do a thing, and before execution, another doth come to countermand this, this is a *Supersedeas* to the first, if there be notice given of it, and whatsoever the Commissioners do upon the first is voyd. And it seems the King may determine an Authority given by a Commission under the Great Seal by a Privy Seal. Also the King may at his pleasure by a Writ of *Supersedeas* out of the Chancery determine any such Commission, and discharge the Commissioners. *Broo. Commiss.* 13. *sect.* 24. *Stat.* 13. *R.* 2 *cap.* 2 23 *H.* 8 *cap.* 5. *By Supersedeas.*

By the death of the King, all Commissions and Patents of Officers who are made only by Patent, and have but a naked authority, *By death of the King.*

authority, do determine and are at an end: But such Officers as are made by Writ, and such as are so by grant: As if the King grant to a Mayor and Cominalty, and their Successors to be Justices, it seems these Patents do not determine, for in the last case it is not revocable. 4 *Edw.* 4. 44. *Litt. Broo.* 509.

By default of Adjournment. If the Justices sit by Commission, and do not adjourn it, the Commission is determined. *Litt. Broo. sect.* 509.

By acceptance of a Dignity. If one be the Kings Steward by Commission to keep his Courts, and after be made Justice, this doth not determine his first Patent; Yet if a man be Forrester by Patent, and after be made Justice of the same Forrest, this latter Patent doth determine the former. *Broo. Offices* 47.

If the Kings Remembrancer in the Exchequer be made of the Barons there, it seems this doth not determine his Patent before. *Dyer* 197. p. 47.

But if a Commission of the Peace be granted to *I. N.* and others, or *I. N.* be Justice of the Bank, and after he is made Knight, this doth not determine the Commission nor his authority or office in either case: So if a man learned in the Law be put in Commission, and after he is made Serjeant at Law, yet hee doth remaine in his authority. *Litt. Brook. Sect.* 295 509.

If any being Justices of Gaol-delivery, Assize, or the Peace, or be in any other of the Kings Commissions, and fortune to be advanced to the dignity of Duke, Arch-bishop, Marques, Vicount, Baron, Bishop, Knight, Justice of the one Bench, or of the other, Serjeant at Law, or Sheriff, their former Commission shall continue notwithstanding. *Stat.* 1 *Ed.* 6. *cap.* 7. *Dyer* 205. & 209.

For other Commissioners (*i*) all the Officers of the Realm, and others. See *Officers, Courts, Purveiors, Bankrupts, Fines, and other titles.*

Commandement or Mandat. This word is diversly applyed, for sometimes it is applyed to the Mandat of the King, as in 14 *Ed.* 3. *cap.* 14. The Justices shall not delay to do right and Law for any commandement that shall come to them from the King under the great or privy Seale, but shall proceed notwithstanding. By which Mandat

Mandat the King of his meer motion casteth a man into prison, and sometimes to the Mandat of Justices: And this is either Absolute (*i*) when of their own authority, wisdome, and discretion, they commit any man to prison for a punishment; or Ordinary, when they commit one rather to be safely kept then for punishment, and in this last case the party committed is baylable. But this word doth most commonly signifie the offence of him that willeth another man to doe any thing contrary to Law, as murther, theft, *&c.* And is also frequently applyed to any commandement whatsoever: and so in many cases it serveth to give and make an authority. *Cromps. Jur. 91. 6. Terms of the Law. Stamf. pleat of the Crown. f. 72, 73.*

Where a Commandement shal be said to be be good or not, and how in respect of the manner.

To make a commandement good to warrant the doing, or excuse the not doing of a thing, these things must concur.

1 He that doth it must have power in the thing.

2 The thing commanded to be done must be lawfull.

3 The commandement must be given in that manner and order that Law requireth. 2 *H.* 7. 14.

A verball commandement in most cases is sufficient, and as good as a commandement in writing, unlesse it be in some speciall cases: As where it is given and made by a corporation (for which see *Corporation*): Or where the Sheriff doth make warrant to a Bayliff of a Franchise, or other Bayliffs to arrest a man: And some such other speciall cases, whereof (see some, in *Authority. supra. Fa. Imprisonment* 3. *subpana* 1. 13 *H.* 7. 17. *Broo. trespasse* 288. *Dyer* 102. *pag.* 83. 329. *pag.* 12.

In respect of the matter commanded, or person commanding, &c. To excuse the doing of something otherwise unlawfull.

Any thing (for the most part) that a man may do by himselfe, hee may doe by another, and therfore the commandement to doe such a thing is good, and may be obeyed without danger: As to enter into, or claym land, seize goods, demand Rent, or the like: Arresting of mens bodies, attaching of their goods, or the like, and this commandement will excuse them: But if the thing commanded be unlawfull, as when one doth command another to kill a man, or to seize another mans goods; these are unlawfull, and therefore such commandements will not countenance such actions.

ctions. And therefore if one doth command another to kill a man, or diſſeiſe a man, or do a Treſpaſſe, both he that gives, and he that obeyeth the Commandement, ſhall be puniſhed as all alike guilty. (See *particeps criminis*) See *Dyer* 102. *p.* 83. 173. *p.* 15. *Kelw.* 89. 2 *H.* 7. 14. *Doct. & Stu. fol.* 18.

By Magiſtrates and Officers that have power a man may be commanded to arreſt mens bodies, goods, *&c.* As if the Sheriff in doing of Execution commandeth me to help him: or an Officer to help keep the Peace: or a Juſtice of Peace to arreſt Rioters, or the like, theſe are good Commandements, and theſe all men muſt obey, or expect puniſhment for their refuſall: And if I command my ſervant to impound another mans cattell, or drive them out of my ground, I may command another to cut downe my Trees upon mine owne ground; theſe are good commandements, and may be obeyed without danger of puniſhment, for this commandement ſhall excuſe. *Fitz. Faun. impr.* 3. *Treſpas* 253. *Avowrie* 260. *Bro. treſpas* 53.

If I have a Warrant or commiſſion to purvey for the King, I may command another to do it, and it ſeems good. *Fitz. Barr.* 259.

If I being an Executor command another to ſeiſe the goods of the Teſtator, and after I refuſe, and another doth adminiſter, yet the commandement is good, and will excuſe him againſt the Admiſtrator. *Fitz. Adminiſtr.* 2.

If I have cauſe to enter into, or make any clayme to any Lands, I may command any other to do it: And in this caſe and ſuch like of things done by another, the rule is, *Qui per alium facit per ſeipſum facit.* And in the caſe of entry, any man where the Entry is lawfull, may of his own head in the behalf of him that hath right of Entry, although he be an Infant that hath the cauſe of Entry, without any commandement enter for him. 10 *H.* 7. 12.

The commandement of an Infant in moſt caſes is voyd, but he may at full age agree to a thing done before, which is *tantamount*, for the rule is, *Omnis ratihitio mandatum æquiperat*; If he in Reverſion command the Tenant for life to digg clay

clay or gravell in the land of the Tenant; this will not warrant nor excuse him, if I bring an Action of Waſt for it. *Perk. ſol.* 3: 2. *H.* 7. 14.

If I ſuſpect a man for Felony, and command another to arreſt him, it ſeems this is not good, unleſſe I be a Juſtice of Peace. *See falſe Impriſonment. Br. Falſe impr.* 14.

If I command one to take the goods of *I. S.* and *I. S.* dye and make me his Executor, in this caſe I may ſue him for the taking of theſe goods, and my commandement will not excuſe him: ſo that as in the caſe before, matter *ex poſt facto* would not make a good commandement void, ſo here it doth not make void Commandement good 2. *H.* 7. 14.

And ſo generally where an Authority had by a commandement is good, there the commandement is good, *Et ſic e contra. See Authority ſupra.*

If a Leaſe be made of a houſe or condition, that the Leſſee ſhall not ſuffer any woman great with childe to abide in the houſe ſix Moneths after warning given: now if the leſſor contrary to this condition, command the leſſee to ſuffer her there, he is not to obey it, for though he do it by his commandement, yet it will not excuſe him: So if one be bound to me in an obligation, with condition to pay me money at a place and day, and I command him not to go there, to pay the money, if he do not, he forfeiteth his obligation, but if I in this laſt caſe, or the leſſor in the firſt caſe, uſe any violence to keep him from comming thither, or to keep the woman in this houſe, this will excuſe. *Fitz. Barre* 162. *Covenant.* 31. *Kelw.* 60.

To excuſe the not doing of, ſome thing that otherwiſe ought to be done, or the like.

If one be bound to pay me Rent on his Leaſe, and I command him to repaire, and lay out ſome of the money, yet he muſt pay me the whole Rent, and this commandement wil not excuſe him. But *Fitz. Barre.* 65. *Fitz. Barre* 45.

If one be bound in an Obligation with condition to pay me money at the day, and I command him he ſhall not pay it to me; or that he ſhall keep it for money I owe him, it is ſaid this will excuſe him, and will be a good plea in Barre to an Action upon the Obligation: ſo if I command him to pay it to another to whom I owe money, ſome ſay this will excuſe.

but

but then I muſt plead payment to him by the hands of that other. *Kelw.* 60. *b. Perk.* 143. *Brow. Condition* 181.

3 where he that doth a thing by Commandement of a Judge or Officer ſhall be excuſed, though the thing be wrongfully don.

Where a Court hath juriſdiction of the cauſe, and doth proceed *inverſo ordine*, or erroniouſly, there the party that doth ſue, and the Officer that doth execute the Proceſs or Precept is excuſed: As if a *Capias* come out of the Common Pleas, and there is no Originall: or a Sheriffe ſend a precept to a Bailiſe, and hath no Writ; or a Juſtice of Peace make a warrant to arreſt a man that is not indicted. But if the Court have no Juriſdiction of the matter, and all the proceeding is *coram non judice*, here the precept will not excuſe, but it is as if there were no Proceſs: And ſo it is if there be an Appeale of death in the Common Pleas, or a *Capias* come out of a Court Baron, or the like. *Co.* 10. 76. *Plow.* 394. *Kelw.* 66.

Juriſdiction.

It is the lawfull power and authority to execute and miniſter Lawes. Or the extent of the Authority of every Court.

Quotuplex.

And this is either Eccleſiaſticall (*i*) that which is limited to certaine ſpirituall and particular caſes, and the Court wherein theſe cauſes are handled, is called *Forum Eccleſiaſticum* which is governed for the moſt part by the Civill and Canon Lawes. Or elſe it is Secular and generall, and the Court wherein theſe cauſes are handled is called *Forum Seculare*, which is governed by the Common and generall Law of the Realme: And for the deciding of all controverſies and diſtribution of Juſtice within the Realme, the Law hath provided theſe two diſtinct Juriſdictions, which it doth take care alſo to preſerve and keep diſtinct and entire, And therefore it taketh order they ſhall keep their bounds, and that one ſhall not incroach upon another, It doth not therefore permit the Temporall or Secular courts to meddle with ſpirituall matters; nor the Spirituall courts to meddle with temporall matters. If the Temporall court meddle with ſpirituall matters, as matter of divorce, or marriage, or the like, the Defendant in the ſuit may in ſome caſes in the beginning of the ſuit take exception thereunto, and deſire of the Court that he may not be ſuffered to proceed in that matter which is not within their Juriſdiction, and thereupon it ſhall be ſtayed, or if it go further, the proceeding is afterwards avoyded as erroneous.

And

And if the Spirituall Court meddle with temporall matters, the party greived may have a Prohibition out of the Secular Court, and by that meanes ſtop their proceeding there; For which look *Prohibition*. And in ſome caſes both the party that doth preferre the ſuit, and the Judge of the court that doth receive and allow it be in danger of a Premunire. For which *See Premunire. Coo. ſuper Litt. 96. a.b. 44. Ed. 3. 5. Crompt. Jur. 100. Fitz. & Bro. Juriſdiction in toto. Stat. 18. Ed. 3 cap. 6. Coo. 10. 76. Doct. & Stu. cap. 55. & cap. 31. 5. Ed. 4. 6.*

The ſecular courts have alſo their limits which they muſt not paſſe. And therefore if a ſuit be begun in one court, the conuſance whereof doth properly belong to another, the party ſued by exception in time may abate the ſuit and ſtay the proceeding there. And in ſome caſes although he do not ſo, yet is the proceeding erroneous, and may be afterward for error avoided. And in ſome caſes one of theſe courts do by writs or commandements in the nature of Prohibitions ſtop the proceeding in another. *See Bro. & Fitz. Juriſdiction in toto, ſtat. 13. R. 2 cap. 2.*

And in ſome caſes it doth fall out, that allbeit, the Court have Juriſdiction of the matter, yet by reaſon of ſome plea the Defendant hath pleaded, it is ouſted of the Juriſdiction, and cannot proceed. As if in the Court of a Corporation, the Defendant plead a Forrein plea that cannot be tried there. *See Court and Officers.*

The nature of a Licence, & how it ſhall be taken.

A Licence is much of the nature of Authority, & the Rules of both have much affinity. 1. For Regularly a Licence is not grantable, nor tranſmiſſible, it is a thing of a perſonall nature, it doth for the moſt part dye with the perſon. 2. It is ſubject to Revocation, eſpecially if it be in matter of pleaſure. 3. It muſt be ſtrictly purſued, eſpecially if it be in matter of pleaſure, for if I licence one to hunt in my Parke, walk in my Orchard, or eat at my table, he muſt not bring any other with him: But if it be in matter of profit, it is more largely. And therefore if one licence me to go over his ground with my Plow, or to cut downe a Tree in his ground, in this caſe I may take as many with my Plow, as is needfull, and as many

to cut and take away the Tree as is requiſite. And if a man exceed in a Licence given by Law, he is a Treſpaſſer *ab initio* and ſo ſhall be puniſhed, but not ſo in caſe of a Licence given by one man to another, for there he ſhall be puniſhed for the exceeding only. *Coo.* 8.146.22. *El.* 447.21. *Ed.* 475. *Broo. Licence* 25.13. *H.*7.13.

2. *What things may be done by Licence: and what not.*

It is a generall Rule, that the King by his Prerogative may diſpence with a penall Law when the forfeiture is popular, or given to the King alone, *Propter impoſſibilitatem prævidendi de omnibus particularibus*; But this is limited to *Malum prohibitum* only, and doth not extend to that which is *malum in ſe*. In all ſuch caſes therefore, and where the Statute it ſelfe doth not take this Prerogative from the King, and conclude him to grant any ſuch Licence, the King by a grant with a *non obſtante*, may make that lawfull to a man by his Licence, that otherwiſe were unlawfull and a Treſpaſſe. Hence it is that the King may licence a man to coine money without offence, and he that hath ſuch a Licence may then do it lawfully. So alſo to tranſport Corne, Wooll, *&c.* albeit Tranſportation be in generall prohibited. *See tranſportation. Coo.* 11.86.88. *Dyer* 54.p.17.11.*H.*7.11 *b. See divers preſidents in Writ* 362, *&c. Sect.*2. *Ph. et M. cap.*5. *El.* 5. *El.*6. *Ph. et M. cap.* 14.

By Diſpenſation.

Prerogative.

The King alſo may grant a Licence to do any thing which by the expreſſe words of any Statute he is enabled to do. As he may licence any of his owne Chaplaines to have plurallity of Benefices of his own gift, and to be *non reſident*, *&c.* by the Stat. 21. *H.*8. *cap.*13.

The King may alſo Licence the doing of Acts prohibited by the Common Law, as to depart out of the Realme, *&c.* 176. *p.*30.

Or an Officer to neglect his Office, *&c. Coo.* 9.102.

But if the thing be *malum in ſe*, for the doing or not doing, whereof the licence is granted, as if it be to kill a man, or to do a Nuſance, or to break a Recogniſance for the Peace, or the like, this will not ſerve to excuſe the doer thereof from blame, or free him from puniſhment. 11. *H.*7.11. *Coo.* 11. 88.

So if the thing be but *malum prohibitum* only, yet if the King

King be restrained by the statute it selfe, and there be expresse words therein, that his dispensation shall not be granted, or if it be, that it shall be void, in this case the Kings Licence will not help: And so it is in the statute of 33. *H.* 8. *cap.* 6. against shooting. *See the Statutes:*

And of 1 *El.* 2. *Ph. et M. cap.* 4 against Ægyptians; And of 21. *H.* 8. *cap.* 13. against plurality of Benefices: And of 1. *Jac. cap.* 22. against Tanners, *&c.* In all which cases no licence or dispensation will help any breach or transgression of any branch of the said Statutes.

So if the King dispense with the breach of a Statute before it is made, this is void. As if he grant a Licence to transport Bell-mettal notwithstanding any statute hereafter to be made, and a statute be after made, this Licence will not dispense with, nor excuse the breach of this Law; But if it be in a thing that doth concerne the King alone, As if he grant a man shall be free from all customes and taxes, *&c.* this may be a good exemption *Dyer* 52. *p.* 1.

By Faculty.

A man may have a Licence to eat flesh on daies prohibited, to marry without Banes first asked, to hold two or more ecclesiasticall livings, the sonne to succeed the Father in a Benefice, or any such like thing as this, and in such cases where they have been used to be granted, and which is not contrary nor repugnant to the word of God. *Stat.* 21. *Jac. cap.* 13 25 *H.* 8. *cap.* 21. 3 *Eliz. cap.* 5. 1 *Iac. cap.* 27.

But a man may not have a Licence to do any thing which is *malum in se*, or contrary to the word of God, as to commit Adultery, live in Incest, break a lawfull oath, and the like, such as the Pope did heretofore grant. But all such Licences are void: nor to allow any thing expresly restrained by any Statute: As to dispense with any other Pluralities of Benefices and *non residence*, then such as is tollerated by the Statute of 21. *H.* 8. *cap.* 13.

By others Licences.

By Licence from the Lord Chancellor any man may convey Butter and cheese to any other place beside the Staple, by the Stat. of 3 *H* 6. *cap* 4.

By Licence a man may practise Physick and use Surgery in *London*, and within seven miles thereabouts, by the Stat. of 3 *H.* 8. *cap.* 11.

By Licence of the open Seſſions, a man may continue a Cottage againſt the Statute of 31 *Eliz. cap.* 7.

By Licence a man that is a houſholder, and hath lived three yeers in the County, may be a drover of Cattell, Badger, Lader, Carrier, buyer, ſeller, or tranſporter of corn, grain, butter or cheeſe: And by apt and ſpecial words in ſuch a Licence, may buy any corn out of an open Fayre or Market to ſell again, and buy cattel where they have uſed, and ſell them again forty miles from thence or more at any Fayre or Market at reaſonable rates: But without Licence no man may do ſo. *Stat.* 5 & 6. *Ed.* 6. *cap.* 14. 5 *Eliz. cap.* 12.

By Licence Knights of the Parliament or Burgeſſes may depart, but not otherwiſe, by the Stat. of 6 *H.* 6. *cap.* 13.

By Licence a Soldier may depart from his Captain, but not otherwiſe, for then it is Felony, by Statute of 18 *H.* 6. *cap.* 19.

By Licence poor people of any place may travell to *Bath* or *Buxton*, but without ſuch Licence they may not, by Stat. 39 *Eliz. cap.* 4.

So alſo by a Teſtimoniall and a Licence of the Juſtice of Peace next to the place where a Sea-faring man landeth that hath ſuffered Ship-wrack, he may begg the next way home, keeping the way and time ſet him by the Juſtice of peace, by Stat. of 39 *Eliz. cap.* 4.

But no Licence to begg in any other caſe, unleſſe they be made by the King himſelf will excuſe Soldiers, Mariners, or any going to the *Bath* or *Buxton* to begg: Neither may Tinkers, or petty Chap-men be licenced to wander up and downe, and uſe their trade in the countrey, by Statutes 39 *Eliz. cap.* 4. 5 & 6 *Ed.* 6. *cap.* 21. 22 *H.* 8. *cap.* 12. 2 & 3 *Phil.* & *M. cap.* 5.

By Licence any man may ſell Ale as a common Ale or Beer-ſeller, and not otherwiſe, by Statute of 5 & 6 *Ed.* 6. *cap.* 25. 4 *Jac.* 4.

What a man muſt plead in ſome caſes of licence, & how.

Any man that may juſtifie the ſhooting in a Gunne by the Statute of 33 *H.* 8. *cap.* 6. may by licence in writing, authorize his ſervant to carry ſuch a Gun to be amended. So a Maſter may licence and allow his ſervant to play at any unlawful game

game with him and in his company without danger of the Statute of 33 *H.* 8. *cap.* 9.

And regularly by the Common Law I may by Licence of another man do, or not do any thing to or touching his body, Lands, or goods; for the doing or not doing whereof, he might otherwise have an Action of Trespasse of the Case, Waste, or the like against me, as imprison his body, wife, or servant, suffer Escapes, kill his Cattell, break his House, ride his Horse, impound his Cattell, or goe over his ground with Horses, Wayns, carts, or otherwise, kill his Game in his Park, or the like, depart out of his service and the like, and this Licence will excuse me if he sue me for it; but then I must take heed I plead it, and do not plead not guilty, *Broo. licence in toto: Coo.* 11. 48 *Fitz. Bar.* 81. 89. 253.

By Licence of the Lord a copy-holder may alien for longer time then one year, although such alienation without licence would be a Forfeiture of his estate. *See Copy-holds.*

But if the omission or commission be *malum in se*, prejudiciall to the Common-wealth or to others, or a thing out of my power, in these cases Licence will not excuse, nor make the thing lawfull. And therefore if a man licence me to kill him, or cut off his arm, or a Lord will licence a Parson that is bound by Tenure to say Divine Service, not to say it, a Steward that is bound to keep Law-day not to keep it, it seemes all these Licences are voyd: So if my Parker licence one to kill my Game, or my Shepheard Licence one to kill my sheep, (a) or I having a Reversion of Land licence a stranger to take the Profits, or cut down the Trees, this is voyd, for this is more then I can do my self. *Broo. Licence* 20. *Fitz. Bar.* 83. (a) *Curia M.* 18 *Jac. B. R.*

Where a Licence is necessary, and where not.

See much of this question in the last Division. And when the Kings Tenant that holdeth of him in *Capite* would alien, he must have the Kings Licence. *See Alienation.*

A Licence from the Bishop, or one of the Universities, is needfull for him that would preach, or teach school.

He that would make a Warren, must have the Kings licence for it.

An

An Appropriation cannot be made without Licence: See *Advowson.*

An Alienation in *Mortmain* cannot be without Licence from the King. See *Mortmain.*

A Bishop cannot be chosen without the Kings Licence, called *Conge desslier.*

An elect suffragan Bishop can take no profit of, or have any jurisdiction by his See, but such as shall be given him by Licence of the Archbishop or Bishop of the Diocese. See *Suffragan. Stat.* 26 *H.* 8. *cap.* 14.

Who may give or grant the licence, & who not.

Dispensation.

In cases of Dispensation with penall Lawes, none but the King may grant the Licence: And the King may not give liberty or power to another to dispense with others, or to give licence or toleration to do or use any thing against any Statute or common-law, or make any Warrant for such Dispensation, or compound for the forfeiture of any penall Law, neither may he grant or promise the benefit of any Forfeiture that shall be due upon any Statute before Judgment be thereupon had, and if he do, all such Grants shall be voyd. *Stat.* 21 *Jac. cap.* 3.

Faculties.

In all cases where the Archbishop or any other Bishop may grant Licences, it seems the King himself may do the same immediatly: But the Archbishop of *Canterbury*, or his lawfull Deputy, or Commissary: and in some case where he doth deny him, some other Bishop, and in this case the party may, and if the cause be great, must have the confirmation of the Kings Broad Seale. *Stat.* 25 *H.* 8. *cap.* 21. 28 *H* 8. *cap.* 16.

Also all other Bishops may grant Licences as they have bin used to do.

And in case of necessity of sickness, the Bishop of the Diocesse, or Parson or Vicar of the Parish may give licence for the eating of any flesh besides Beefe, Veale, Mutton, or Bacon, but unlesse it be in case of necessity, the Licence is not good. *Stat.* 5 *Eliz. cap.* 5. 1 *Jac. cap.* 27.

But neither the Pope or any other may give or grant any such Dispensations, neither may any sue for them from the Pope under a great penalty. See *Premunire*, & *Treason. Stat.* 25 *H.* 8. *cap.* 21.

The

The Licence for Butter and Cheese must be made and had from the Lord Chancellor: The Licence to practice Physick and Surgery from the Bishop of *London*, or Dean of *Pauls*, with the advice of three of the Doctors of Physick there: The Licence for the continuance of a cottage from the Justices of the Sessions: The Licence for Drovers and the rest must be by the generall and open Sessions, and three Justices hands to it: The licences of Knights and Burgesses of the Parliament must be from the Parliament, and must be enrolled there: The licence of the Soldier must be from the Captain: The licence of the poor that travell to *Bath* or *Burton* must be by the two next Justices: The licence of the Seafaring man to beg who hath suffered Ship-wrack, must be by the next Justice of the place where he landed, the licence to sell Ale or Beere must be by the open Sessions of the Peace, or by two Justices of the Peace, whereof one must be of the *Quorum*: And the rest of the Licences must be made by the persons before set down. *See the Statutes before.* *Other Licences.*

The Licences to excuse at Common-Law must be made from the party himselfe whom the thing doth concern, or some other under him: For if my Wife or servant do by my appointment licence a man to do any such thing, it is as good as if I did it, and shall be pleaded as my Licence: As if I bid my Tenant give the Hawks there to whom he will, and he licence a stranger to take them, this is a good licence: And my Bayliff may licence one to ride my Horse, milk his Kyne he hath in custodie, or the like. But none other person may give any such Licence in any of these cases. *Fitz. Bar.* 36. 10 *Ed.* 4. 4. 12. *H.* 7. 25. *Fitz. tresp.* 125.

The Kings Licence or Dispensation is, and must be alwayes by patent under one of his Seals. *Dyer* 54. *p.* 17. *How and in what manner the Licence shal be made.*

The Arch-Bishop must grant his Faculties under his hand and Seale by writing, and in some cases (as before) the Kings Confirmation is requisite. So if any Bishop grant any Licences, it must be in writing under their hand and seale. *See the Statutes and Cases above.*

If the Licence be made and given by a Corporation, it must be in writing, and cannot be by word only. *See the Statutes.*

If

If it be made upon a Statute, it must be according to the Statute: As that which the Master doth give his servant for the carriage of a Gun must be in writing: but that which is given to the servant to licence him to play at unlawful games with his Master, may be by word. All the rest of the Licences upon all the Statutes it seems must be in writing.

And in all the cases at Common Law of omission and commission for the most part a verball Licence without any writing is sufficient. *Coo. 9. 99. Fitz. Barr. 30. 89.*

But if a Licence be to take Common, as if I have Common apprender in another mans ground, and I licence another man to take this: Or if a Licence be claimed, as annexed to an estate of Inheritance, it must be by deed, and cannot be by word: or if it be to have a thing for life, as if I claym a licence from a man to go over his ground during our lives, it seems this is not good without writing. *22 H. 6. 52. Dyer 281. p. 19.*

when a Licence shall be said to be pursued, and when not.

The Licence in Law is then pursued, when we do as much as the Law doth authorize and no more: As for a man to goe into an Inne and there to behave himselfe orderly; for him that hath a Reversion to goe into his Land and view it, and be gone, *&c.* But if a man that goeth into an Inne or Tavern shall then take away a Bowl with him, or break the windows or the like: Or the Lessor that coms to view the reparations of the house shall break the windows, or stay there all night: Or one that distrayneth Cattell, Kine, or Oxen, shall milk the Kine, or labour the Oxen: Or if it be Corne, if he thresh it out: Or if a Commoner that hath power to take his Common shall cut down the Trees upon the Common: Or a Purveyor that taketh Cattell by vertue of his Commission, shall afterwards sell them; in all these cases he doth exceed the power or leave the Law doth give him, and therefore the Law doth judge all that he doth unlawfull. *Broo. licence 17. Coo. 8. 146. Perk. sect. 190.*

Licence in Law.

Licence in deed by the party.

The Licence of the partie is then pursued when he that hath it doth what he had licence to do, and no more, and in some cases when he doth lesse then that. As if the Lord licence his Tenant to alien for twenty years, and he alien for three

three yeares, this is good. (b) But if a Lord licence his Tenant to Alien from Michelmas last for twenty one yeares, and he Alien it from Christmas next for 21. years this is an exceeding of the licence, and a forfeiture of his Estate. *Broo. Licence in rots.* (a) *M. 37. El. 38. Eliz. Adjudg.* (b) *Trin. 36 Eliz. Co. B. Jacksons Case. 13. H. 7. 13.*

If I licence a noble man to walk in my Garden, or hunt in my Parke, and he come there with a reasonable company of attendants, this is no Exceeding, but a pursuit of the Licence. So if I licence a man to go with his Plow over my Close, or to cut down a Tree, there he may take a reasonable company to do it. So if I Licence a man to take two Horses out of my stable, and he do take but one this is a good pursuit.

So if I Licence any man to kill a Buck in my Parke, and he take a reasonable company to do it, this is a good pursuit of the licence.

But if I licence another to ride my horse three miles, and he ride him four miles: Or I licence him to take my blacke or white horse, and he take both, or I licence an ordinary meane man to hunt in my Parke, and he take other company with him: or I licence a man to go into my house to fetch some what there, and he takes away somewhat else, or breaks the Windows or the like, or I licence one to goe into my Close and deliver the Cattel there to *I. S.* and *I. S.* go into the Close also; In all the first cases it is an exceeding in them that had the licence, and in the last by *I. S.* And therefore they are all punishable accordingly for the exceeding only. *Broo. Licence 17. Fitz. Trespasse 139. 242. 18. Ed. 4. 14.*

Where a licence is revocable, & when it shall be said to be determined. or not.

All Licences for the most part (be they made by King, or subject, word, or deed) are revocable, so that if either the party doth countermand it, or either of the parties dye, it is determined. But herein there are differences taken between Licences of pleasure, and Licences of profit; and Licences for a time certaine, and Licences for a time uncertaine. For generally all Licences of pleasure only, as to hunt or walke, &c. are revocable, and by any act whereby an Authority is countermanded, will be determined; And so likewise if it be a Li-

cence of profit, as to dig clay in my ground, or to take the profits of my ground, if there be no certainty in the time of the granting of the Licence, or if it be granted only during his pleasure that doth grant it, this will also determine as the former. But if the Licence be of matter of profit, or be mixed therewith, and be for a time certaine, then no countermand in Deed or Law will determine it, for then in many cases it doth amount to a Lease for a time certaine, which cannot be recalled, neither will death determine it. (a) If a licence therefore be made in writing to go over a mans ground during both their lives, it seems this is not revocable. *Broo. Licence.* 7. 9. 15. (a) *Per Inst. Glom.* 9. *Iac.*

Dispensation. If the King grant Licence to Alien land held of him, and after dye before it be done, it seems the Licence is determined; But if he grant licence to Alien in Mortmaine; or grant a Licence to a man to go beyond Sea, and stay there for a certaine time set down in the licence, or to stay there for all his life, or the like, in these cases, the death of the King will not determine the licence. But in other cases the Kings Licence may be determined by the act of God, or the King himselfe, as other mens: *Dyer* 92. *p.* 17. 54. *p.* 27. 92. *p.* 17. 217. *p.* 22. 176. *p.* 30.

Other Licences. If I licence a man to cut downe Trees, or to do any other thing that may be done by licence, and before it be done, I forbid him to do it, or he dye, or I dye, or if I be a woman, I take a Husband, in these cases the licence is determined. But if I give a man leave to come into my house (*as rigore juris*, I must, if his coming into my house be lawfull) and when he is in, I bid him go forth, if it be such a tempest, or there be any such case that he cannot go forth without danger, he may stay a little while, and so long he may justifie as the necessity doth last. 39 *H.* 6. 7. 20. *Ed.* 4. 4. 13. *H.* 7. 13.

So if I licence one to leave a Rick of Hay in my Close, until he can conveniently take him away, and after I sell the Close to a stranger; this is a determination of the Licence, and the purchaser may put in his Cattell, and eat it up if it be not fenced, without giving him notice. *Adjudge Hill.* 17. *Jac. B. R. Shirell wibbs case.*

And in all these cases where the licence is determined, the act

act done is done without licence, and then the party that doth it is an offender, and may be punished as if such licence had never been made.

But if an estate be made for life, or yeres, or condition, that the Lessee shall not Alien without licence of the lessor in writing, and he by his deed in writing do grant a licence to Alien, and after dye, or revoke it by his owne act before the Alienation, yet this is not determined, neither is this licence revocable, for it differeth from all the cases before, and this licence is of another nature.

Marriage.

Marriage is the copulation of a man and woman together, by agreement to be man and wife by an inseperable Conjunction to live together all the dayes of their life. And the inception of this first is, when wedlock is promised and vowed by words in the future tence, which is called *Affiance or Sponsallitie*, which therefore is defined to be *Futurarum nuptiarum conventio & repromissio*, for the full contract of Matrimony, is when it is made by words *de presenti* in a lawfull consent, And so two be made man and wife before God without lying together, and that without consent of Parents or Tutors, which is not of necessity, though it be meet and convenient to be had: But *Matrimony* is not accompted consummate by our Law, untill it be celebrated and solemnized *in facie ecclesiæ. Coo. super. Litt. 76.a. Bract. lib. 4. f. 298. Glanvil. lib. 11. cap. 1. Womans Lawyer fo. 117.*

Affiance or Sponsallity.

Contract of Marriage.

Affiance Quotuplex, & the validity & fruits thereof.

This *Sponsion* or first promising is also sometimes naked (*i*) when they do promise simple and barely by their word only each to other, to contract Matrimony hereafter, and sometimes confirmed (*i*) when there is an Oath made, or somewhat taken as an earnest or pledge between them on both parts, or on the one part, to be married hereafter. And it also is either publique, and that is, either by the parties by themselves present together or by Message & Letters when they be a part, and of, and to which there be some privy & witnesses, or else it is secret *Soluz cum sola*, to which none are privy but themselves, which being proved well, is of the same force with the former. Save only that a promise made after to an other in publique, shall be preferred and prevale against it;

Sponsion. Simple / conditionall

it; This is also sometimes simple, and sometimes it is Conditionall: If it be conditionall it suspendeth the promise, till the condition be performed, unlesse by a new agreement the Condition were discharged. But if the condition be against the right of Matrimony, it maketh the promise void, As to poison the child she first conceiveth, &c. But though otherwise unhoneſt or impossible, yet if it be not against the Law of Wedlock it is good enough. But this affiance be it Naked or confirmed, publique or privat; is not of that force, as to compell the parties to marry, but is an obligation only, or being bound in a sort to marry hereafter; for after such a promise only, the parties may marry themselves to others; And yet it seemes, the party that doth break his or her promise in this case is subject to suit and some punishment in the Spirituall Court. But a legall contract containeth more in it: and is compulsory; And yet neither affiance nor contract is of the force of marriage, for by this only without marryage, neither Husband nor Wife shall have any benefit by th'others death and till then they are severall persons in Law, and may enfeoff one another. *Perkins.*

Contract legall.

Note that in all these Promises, the Law requireth not a curious forme of words, for any words whereby their agreement may appeare will be sufficient. *The womans Lawyer. f.52.*

All persons may lawfully marry that be not prohibited by Gods Law to marry, (that is) that be not prohibited by the Levitticall degrees; All Clergy men may marry aswell as others, and their children shall be legitimate, And they themselves shall have all the priviledges of Marriage that other men have. *Stat. Sect. 6. Ed. 6. cap. 12. Stat. 32. H. 8. cap. 38. & 2. & 3. Ed. 6 cap. 21.*

The six Clerks of the Chauncery, and other Clerks there, may marry notwithstanding the old custome to the contrary. Also all such as exercise any Ecclesiasticall Jurisdiction may be married, notwithstanding their office and imployment. *Stat. 14. & 15. H. 8. cap. 8. 37 H. 8. cap. 17.*

In this conjunction many things are prohibited, and divers things required, 1. In the parties themselves. 2. In the making

king of their agreement. *Cap.* 437. In the parties themselves, 1. That there be no impediment naturall, or accidentall: that they be not either of them within age of consent *(i)* the man under fourteen, and the woman under twelve, for then may they after when they come to this age avoid the marriage by their disagreement, without any divorce at all, and marry others. But by the Civill Law it seems they are deemed able to consent when they are *Puberes* ripe, and fit for marriage, though they are not of this Age. 2. That they be of a sound & whole minde to consent, and not *Inops mentis*, for he that is madd, without intermission of fury, cannot marry, but he that if deafe and dumb may contract Matrimony. 3. The persons must not be in relation one to another, *Infra gradus prohibitos* (that is) in respect of consanguinity, for marriage is forbidden betwixt those that are of kindred Lineallye (1) parents and children, in *infantum*: Also betwixt those that are kindred in the *Transverse* or collaterall line, untill the fourth degree be past, or in respect of Affinity or *Alliance* and this riseth between them that are married, and the kindred of one of them, as betwixt the Husband and the kindred of his Wife; But this prohibiteth marriage only to the Persons contracted, *&c.* for the Cozens or consanguinity to my wife, are affinity only to mee, and not to my Brothers or children by a former wife, and so *e converso* my blood, to my wife. Hence it is, that Father and Sonne may marry the mother and daughter, and that two Brethren may marry two Sisters. And after the fourth degree be past, a man may marry any of his affinity. And those that are not within the Leviticall degrees, are not forbidden. *(e)* therefore a man may marry the Daughter of the Sister of his first wife. 4. The persons should be of the same Religion, for by the Lawes of the Church, Marriages are not good betwixt Jewes and Christians. 5. The persons must be fit for generation, and therefore those that by coldnesse of nature or inchantment are impotent are forbidden to marry. 6. The persons must be also free, and not be engaged to any other, either of them by precontract. 2. In the making of the contract. 1. It must be free. And therefore if both, or either of the parties be compelled by threatnings

What persons may marry, who not. Impediments of marriage is lawfull what not.

dings imprisonment, or the like, or drawne by inchantment, &c. fraud or flattery, or other such means against their wills to agree, this will make the marriage voyd, 2. It must be lawfull, And therefore if it be corruptly made, as when one hath Adulterously polluted a woman, If he promise her to have her when his wife dyeth, &c. See more in the womans Lawyer. If any marriage be made where any such impediment is as aforesaid, either in the persons that make it, or the manner of making it, it may be avoided againe afterwards by divorce at the Suit of the party greived, by sentence in the Ecclesiasticall Court, for to that Court these matters do belong, and the Ordinary is ever to judge, discusse, and determine this question and matter of Marriage. But it is not voyd untill by sentence of the spirituall Judge it is avoided. And therefore if that be not had in the life time of the parties, the Issue are Inheritable, and it can never be avoyded after, for a divorce cannot be after the death of either of the parties. *Stat.* 14 & 15. *H.8. cap.*8. 37. *H.8. ca.*17. *cap.*437. *Coo. super Litt.* 79. *a.b. Broo tit. Gard.*124. *the Womans Lawyer* 57. 58. *Stat.*32. *H.8. cap.*38. *Leviticus cap.*18. (e) *Trin.*2. *Iacobi. Rich. Parsons case. Coo. B. Womans Lawyer fo.*59. *Kelw.*53. 12. *H.8. f.*6. *Dyer* 305. 12. *H.*7. 22. *Broo. Bastardie* 23. 37. 44. 47.

After parties are so married, and the marriage consummate in facie Ecclesiæ as aforesaid the persons so married are reputed and accounted Husband and wife.

Husband and wife. Husband and Wife, are a man and a woman coupled together by marriage, and then is this woman so married, said to be a *Feme Covert*, which is defined to be a woman legally marryed to a Husband, and marryed shee must bee, for untill shee be married, although she be Espoused or contracted, yet she is not reputed a *Feme Covert*. But when she is married in *facie Ecclesiæ*, then is she reputed a *feme Covert* though her Husband never have any carnall knowledge of her, and hence is the word *Coverture* for so long as these persons do so continue married, so long there is a *Coverture* between them, and the *Coverture* is said to continue. And whatsoever is done

done during the continuance of this marriage, is said to be done during the Coverture. *See the Womans Lawyer.*

To what purposes they shall be reputed but as one person in law, & to what purposes they shall be reputed divers persons in law.

This marriage of two such persons doth knit them so fast, and make such a straight fellowship between them, as that they are sayd to be but *Una persona: Una caro & sanguis unus*: And hence it is, that howsoever in the obliquity of Fines, Recoveries, and Uses, there is a way, yet a man cannot by down-right livery or Bargain, Feoffment, Gift, or Lease, passe lands to his Wife during the Coverture, nor make any covenant or obligation to her: and if one enter into a Covenant to make his wife a Feoffment, it is impossible, and therefore voyd, yet one may bind himself in an Obligation or Covenant before or after marriage to a Stranger, to let his wife have necessaries, or so much cloths, or to pay her so much money by the yeer to do it, and this is good.

2 The one of them cannot sue the other, neither can the Wife sue any Stranger, unlesse her Husband be joyned with her.

3 The Wife as she doth participate of the name of her Husband (for she changeth her name into his) So also she doth partake of the nature and condition of her Husband. Hence it is, that if he be an Earl, she is a Countesse, he a Knight, she a Lady: If he were an Alien, and be made Denizen, the Wife shall be so also: If a Free-man marry a bond-woman, she shall be free during the Coverture: And if a Lord marry his Wife, she shall be free during the Coverture, and *e converso*: If a Dutchesse or Countesse by birth marry with a Gentleman or Esquire, she looseth her name and dignity, and must follow the condition of her second Husband, *Uxor consortur dignitate mariti.*

4 Hence it is also that the Wife cannot be produced as a witnesse for, or against her Husband (*b*) a writ of conspiracy will not lye against Husband & Wife. (*c*) If she deliver her Husbands goods to a stranger, Trespasse doth not lye against the stranger, but some other action. (*d*) If *T.* enfeoff *W.* and *M.* his Wife, and after it is by Parliament enacted that all estates made by *T.* to *W.* shall be voyd, the Feoffment shall be void as well to the Wife as to the Husband. (*e*) If one purchase

Lands held in *Capite*, to him and his Wife, and his Heyrs without licence, and after have a pardon of all offences, *pro quacunq; alienatione sibi facta*, and do not speak of his Wife, yet it is a good pardon (e) if a Feoffment.

5. If a Feoffment be made of land to them two, and a third person, they two shall have but a moiety: If to them two, and two others, they shall have but a third part: And if it be made to them two after their marriage together, there shall be no moyeties between them, therefore the Husband can neither grant nor forfeit any part of it. And if the Husband alien it, she may after his death recover the whole by a *Cui in vita*. If a Villain and his Wife purchase Land, the Lord enter, & the Villain dye, she or her heyrs shall have it. So if the Wife take & convey away her Husbands goods, this is no felonie in him. So if the Husband joynt purchaser be an Alien born, or attaint in a premunire, or for felony. *Coo. super Lit.* 112. 187. *Plow.* 294. *F.N.B.* 78. 27 *H.* 8. 27. 4 *H.* 7. 4. *Perk. sect.* 763, 764 (3) 39 *H.* 6. 45 *Exod. chap.* 21. 3. 4 *H.* 7 31. *Litt. Dect. & Stu.* 139 *Broo. sect.* 499. *Coo.* 4. 118 6. 53. (4) *Coo. super Litt.* 6. *b.* (b) *F.N.B.* 116. *Stam. pl. Corona.* 174. (c) 11 *H.* 4. 24. *Hawk.* (d) 5 *H.* 7. 31. (e) *Dyer* 296. (5) *Litt. sect.* 292. 39 *H.* 6. 45. *Plow.* 483. *Coo. super Litt.* 187. 40 *Ass. p.* 7. *Broo. Parli.* 43.

But in other cases they are considered as divers persons in law, and so one of them may do an act to another: As first, when they doe it in *auter droit*, or as in the person of another. As if a Feoffment be made to one of them, and a letter of Attorney to the other to give livery, this the one of them may do to the other. So if the Wife be an Executrix, she may pay or deliver a Legacy to her Husband: So if she have power to sell Land by Will, she may sell it to her Husband. *Perk. sect.* 169. 11 *H.* 7. *Coo. super Litt. f.* 187.

If an estate be made to the Husband and Wife before marriage, and after they marry they shall have moyeties between them, and one hath not all as in the cases before (*See more cases for this infra*) *Coo. super Litt. f.* 187. 355. *b.*

What acts the Husband may make to his wife during the coverture, where not.

Though by no conveyance at the Common-law, by plaine livery or Bargain, a man could during the Coverture, either in

in Poſſeſſion, Reverſion, or Remainder, limit an eſtate to his Wife, yet by ones Teſtament one might, and ſtill may, either by cuſtome or Statute deviſe his Land to his Wife in fee-ſimple, fee-tayle, or for tearm of life or years, and one may now upon the Statute of 27 *H.* 8. limit a uſe upon a Feoffment to, or a Covenant with others to ſtand ſeyſed to uſes, to the uſe of his Wife: So that now in the obliquity of Fines, Recoveries, and uſes, there is an expedite way of tranſporting of Inheritance between them. As a Feoffment, Fine, or Recovery may be had and ſuffered to the uſe of the Wife of the Feoffer or Conuſor and her Heyrs. Alſo a man may make a Feoffment to a ſtranger on condition to reinfeoff the Wife of the Feoffer, and this is good by the Common-Law. 4 *H.* 7. *Coo. ſuper Litt. fol.* 112. *Perk. ſect.* 763.

Alſo he may give her any of his Goods or Chattels by his Will, for that is not to take effect untill after his death. If an other man make a Feoffment to my Wife, and a letter of Attorney to me give her Seyſin, I may do it, and it will be good enough. *Perk. fol.* 41.

What acts the wife may doe to her Husband, where not.

If *Ceyg. uſe* had deviſed that his Wife ſhould ſell his land, and made her Executrix, and died, and ſhe took another Husband, in this caſe ſhe might ſell the Land to her Husband. 10 *H.* 7. 20. *Coo. ſuper Litt. f.* 112.

But if a *Feme Covert* be ſeized of land in fee-ſimple, ſhee cannot deviſe it to her Husband, for ſhe *is ſub poteſtate viri*, and can do nothing in her own right without him, for the Law will preſume it done by Coertion of her Husband. *Coo. ſuper Litt.* 112.

How acts done to the Feme covert alone ſhall eaure.

A *Feme Covert* cannot take by grant from the husband: but ſhe may, & that without any precedent aſſent or agreement of the Husband, be capable of, & take lands or goods by the gift or grant of others; & therfore all Feoffments, Leaſes, Obligations, *&c.* made to her are good, & this is good, untill the Husband diſagree to it by word or deed, or both. And if he do neither agree nor diſagree in his life time, then is it unavoydable by any from or under him: But if he diſagree to it, he makes it all voyd; but after he hath once agreed, hee cannot by diſagreement avoyd it: And if an Eſtate be made to the

Wife, and the Husband do agree to it, yet the Wife or her Heyrs after his death, may disagree to it, and avoyd it. *Vide agreement.* 21 *H.*7. 20 *Br. Cons.* 13. 27 *H.*8. 25. *Perk.* 2. 43. *Co. super Litt. f.* 3. 1 *H.*7. 16. 7 *H.*4. 17. 18 *H.*6. 8. 25 *Ed.*4. 11.

How acts done to the Husband and Wife shall enure.

If a Reversion be granted to a man and a woman and their Heyrs, and before Attornment they two entermarry, and then attornment is made: Or if a Feoffment were made to them, and after they marry, and then livery of Seisin is given to them, *secundum formam Chartæ*: In both these cases they shall take entirely, and not by moyties. But if a Feoffment were made before the Statute to the use of a man and a woman and their Heirs, and they entermarry, and then the Statute is made; in this case they have moyties, and the Husband may alien a moyty during the *Coverture*. *Fitz. Distens* 52. *Co.* 4. 68. *Plow.* 483. *Co. super Litt. fol.* 187.

If an Estate be made to a Villayn, and his Wife being free, and to their Heyrs, and the Lord of the Villayn enter, yet if she survive her Husband she shall have the whole. 40 *Ass.* 7. 7. *Co. super Litt.* 187.

If one make a Lease to *A.* and to a Husband and Wife, *viz.* to *A.* for life, to the Husband in tayle, and the Wife for years, in terms each of them hath a third part, in respect of the severalty of the Estates. *Co. Ibidem.*

If a Feoffment be made to a man and a woman sole, and their Heyrs with Warranty, and they intermarry, and after are impleaded, and vouch and recover in value; now of this land so recovered in value, there shall be no moyties between them, because they are not now capable of moyties. *Plow.* 485.

If I let land to a Feme sole for her life, and she taketh a Husband, and after I confirm the Estate of the Husband and Wife, *To have* and to hold for terme of their two lives, in this case the Husband doth not hold jointly with his Wife, but holdeth in right of his Wife, for the terme of her life, and after for terme of his own life by way of *Curtesy*, if he survive his Wife. And if it had been made of his Estate to him alone, *To have* and to hold the Land to him and his Heyrs, then had he had it absolutely, and thereby he should have had

had the Fee-simple after the death of his Wife. But if the Confirmation had been made to the Husband and Wife, *To have* and to hold the land to them two, and their Heyrs, they are Joynt-Tenants of the Fee-simple, and the Husband is seized in the right of his Wife for her life, for they cannot take by Moyties during the Coverture. *Coo. super Lit. 299. Fitz. Release 45.*

If a Deed be made to the Husband and Wife of land, and after his death she do accept of the estate, now she is bound to perform all the inherent Covenants as much as her Husband. *See Covenants 45 Ed. 3. 11. Dyer 13.*

If a man letteth land to the Husband and Wife, *To have* and to hold the one moytie to the Husband for the tearm of his life, and the other moytie to the Wife for the tearm of her life, and the Lessor confirm the estate of them both in the Land *Habendum* to them, and to their Heyrs: by this Confirmation, as to the moyty of the Husband it enureth only to the Husband and his Heyrs, for the Wife had nothing in that: But as to the moytie of the Wife, they are Joint-tenants, for the Husband hath such an Estate of the Wifes moytie as is capable of confirmation. *Coo. super Litt. 299. Fitz. Confirmation 17.*

And if one disseise me, and after I take a Wife, and then after the Tenant doth make Feoffment of this Land to me and my wife, this shall enure to me only, and my wife shall have no benefit by it. *Dyer 10. a.*

If lands be given to a man and his wife, *Habendum*, the one moity to the Husband, and the other moity to the VVife, in this case they shall take severally, and be seyzed of Moities as Tenants in Common, *per Knightly (See more to this supra.)*

what things are given to the Husband by the marriage, and how, what not.

Howsoever it be so, That whatsoever the Husband had before coverture either in Goods or Lands, is absolutely his own, and the wife hath neither seisin nor property therein; yet all that was the VVives, by the inter-marriage is now made the Husbands, *& non habet uxor potestatem sui sed vir, & res licet sit propria uxoris, vir tamen eius Custos, cum sit caput mulieris.* But it is the Husbands, *diverso modo*, For as for all the Lands and Tenements whereof she hath any Estate in

Fee-simple, Fee-tayl, or for life, these he is to have during both their lives together. And some of them sometimes after for his own life, by the courtesie of *England*. And also all the right and titles of Entry that she hath into any Lands, are given to the Husband, so that he may enter or claime it as the woman might. Also all her Chattels reall she hath in possession, and in her own right, as wardships of Tenants in *Capite*, and Knights service, estates by Statute-marchant, Statute-staple, leases for years, and the like, he shall have the use and occupation of, and power by act executed, to give, grant, or sell, surrender or forfeit it during his life: And if he survive his wife, he shall have them absolutely, and not conditionally only as he hath them before. Also all her Chattels personall, as Horses, Sheep, Neat, Corn, VVool, Money, Plate, Jewels, even to her Chamber, Bracelets and Apparell more then needfull, which she hath in her own right, property and possession, are given, with the property thereof unto him by act of Law, by the intermarriage, so that he may sell, keep, or bequeath it if he dye; and if he do not bequeath them, they shall goe to his Executors, whether he survive his wife or no, and this is to be understood not only of that she hath at the time of the marriage, but that which shall fall to her also at any time after the marriage during the Coverture. Also all her Choses and causes of action for any matter before, or after the marriage are his to take, sue for, or release, when they be due at any time, during both their lives together; but if he do not dispose it, it will come to his wife again after his death: And therefore if a Legacie be given to a woman sole, and she take a Husband, untill her Husband release or receive this, if she dye she may devise or dispose it; and if he dye, it will return to her, and shall not goe to his Executors, except it be received by his appointment, for then the thing in action is become in possession. *Cok. super Litt. f.* 112. 300. 351. *Plow.* 191. 419. 21 *H.* 7. 29. 36 *Ed.* 4. 8. 7 *H.* 6. 1. 14 *H.* 4. 24. 39 *H.* 6. 27. *Cok.* 10. 51. *Duff. & Stu. f.* 13. *Cok.* 6. 36. *Dyer* 177. 251. *Plow.* 204. 260. 10 *H.* 6. 11. 11 *H.* 7. 19. *Perk. fol.* 148. *Huntley & Griffith*, p. 38 *Eliz. B. R.*

And

And if she have made Feoffment or condition that the Feoffee, shal pay her 100 *l.* at a day, & before the day she marry now in this case the Husband shall have this money; or before the day he may release the condition, and this will bind her. All her wardships of Socage Tenure, Heyrs, and Tuitions, he shall have during the Coverture only. *Plow.* 304. *Dyer* 25 *t.*

But there is this difference between a property of personall goods, and a bare possession only: For if personall goods be bayled to a Feme sole: Or if she find them, or if they come to her hands, as Executrix to a Bayliffe, and taketh a Husband, this bare possession is not given to the Husband, although the action of *Detinue* must be brought against the Husband and the VVife. 39 *Ed.* 3. 17. *Coo. super Litt.* 352.

All the Goods and Chattels also the VVife hath in *autre droit*, as Executrix or Administratrix, or as Guardian in Socage, *&c.* the Husband shall have the disposing power of, during the Coverture, so that during that time he may sell or give them *Plow.* 294. 192. *Dyer f.* 7.

If any Chattels personall were giuen to the VVife, *dum sola fuit*, and to a Stranger, and after she marry, now the Husband alone, and the Stranger are Tenants in common of this Chattell, and the Husband shall have an absolute property in the one halfe of them. *Plow. en Bracebridges Case.*

But none of her dignities are given to him; for though the Husband may be enriched, yet he cannot be ennobled by his Wife: and though a man may ennoble a VVife, yet a VVife cannot dignifie a Husband: But she may loose her own dignity by taking a Husband; As in the case of the Lady *Anne Powes* 4 *Maria* 1. *Quando mulier nobilis nupserit ignobili desinit esse nobilis. Brac.* 5 *Ed.* 499.

what things the Husband shall have after the death of his wife.

After the death of the wife, the husband shal have not only all the Chattels personal of his wife which he shal have, whether he survive her or not, but also all the Chattels reall of his wife, which then he shal have absolutely to himself as his own other chattels reall: And if they were joyntly possessed of any Chattels

Chattell reall, as where a wardship or lease for years is made to them two, after her death her Husband shall have the whole. *Coo. super Litt.* 351. 46. *Plow.* 191, 192. *Fitz. joinder in Action* 20.

All Chattels reall being of a mixt nature (*viz.*) partly in possession, and partly in action, which happen during the Coverture he shall have if he survive his Wife, albeit he doth not reduce them into possession during her life-time: As if the Husband be seysed of a Rent Service, Charge, or Seck, in the right of his wife, and the Rent become due during the Coverture, & the wife dieth, he shall have the arrerages: So if he have an Advowson in the right of his wife, and the Church become void during the Coverture, if he survive her, he shall have the Presentation. *Coo. super Litt.* 351. *F.N.B.* 121, 122. 14 H. 4. 12. *Coo. super Litt.* 120.

All arrerages of Rent incurred and due to the wife before or after Marriage, the Husband shall have, if he survive the wife. As if the Wife be endowed of a Rent, and she take a Husband and dye, he shall have the Rent arrear during the Coverture, and may sue for it by the Statute 32 *H.* 8. *c.* 37. If he make a lease of his wives Land, rendring Rent, and she dye, he shall have the Rent due in her life time. *Coo.* 4. 51. *& super Litt.* 351. *F.N.B.* 121. 9 *H.* 6. 52.

Also Cases in action recorded by him, or him and his wife in her life time by Judgment, the Husband shall have also, and as Executor or Administrator to her he may have all that she hath. *F.N.B.* 121. *Coo. super Litt.* 351.

If a legacie be given to a woman sole, and she take a Husband, and after she makes a Letter of Attorney to one to receive this money given by the legacy, and then she dyeth, in this case the Husband, and if he dye, his Executor or Administrator shall have this money, and may have an action of Accompt for it against him that received it: So if the Husband had made the letter of Attorney: but before the thing in action be turned into possession, the wife may devise, or give, or dispose it to her Husband or any other, and he cannot have it but by her legacy, or by Administration from her; but now by the receipt of it, the property doth rest in the

the Husband, and he, his Executor or Administrator shall have it. If the woman have a Bond, and she take a Husband who doth make a letter of Attorney to another to receive the money, and she dye, the Husband shall have it and accompt for it, *pro Popham. Ch. Just.* for the thing in action is become in possession. *Huntley & Griffith case, p. 38 Eliz. B. R.*

What not: but the Executor of the wife, or some other shall have it.

If a Feme sole be possessed of a Chattel reall, and be thereof dispossessed, and then taketh a Husband, and the wife dyeth, and the Husband surviveth, this right is not given to the Husband, but the Executor or Administrator of the wife shall have it: And so as Executor or Administrator, the Husband may have that that another may have by that meanes. *Coo. super Litt. 351.*

So if the VVife have but a possibility, and no interest, and dye, the Executor, and not the Husband shall have this. *Idem.*

If she had a wardship by reason of a tenure in Socage, and dye, her Husband shall not have this, but it shall go to some other, and if he dye before her, this shall survive to her, and not go to his Executor. *Plow. 293.*

If the Goods and Chattels she hath in right of another, as Executrix or Administratrix after her death, her Executor or Administrator, not her Husband must have it. *Coo. super lit. 351. Plow. 294. 192.*

If a woman sole granteth a tearm to her own use, and then taketh a Husband and dyeth, the Executor or Administrator of the VVife, not the surviving Husband shall have this trust. *Pasc. 32 Eliz. Withams Case, in Cawold. Coo. super Lit. 351.*

Chattels reall consisting merely in action, as a writ of right of Guard, *avatore maritagij*, or forfeiture of marriage Relief whereunto the wife was entytled before the marriage, the Husband shall not have unlesse he recover it, during the Coverture: So also chattels Personals that be in action, as debts by obligation or contract, or otherwise, before or after marriage; for he that sues for them after, must sue as Executor or Administrator to the wife, and that the Husband may be if he will, for he may give her leave to make an Executor, and she may make him her Executor, or if she dye intestate, he may sue forth an Administration, which in

right

Right belongs to him. But yet see now *Statute* 32. *H.* 8. *cap.* 37.

If one give a Feme sole a Legacy to be paid presently or at a day to come, and shee marry, and dye before any release or dispose all by her Husband, in this case, her Executor or Administrator not her Husband shall have it. *Per chief Justice Mich.* 17. *Jacobi B. R. El. Trin.* 38. *Eliz. Iacobi Regis, Hunttleys case Accord.*

If I have the Inheritance of Land, whereof there is a lease for yeares, and the Lessee grant his Lease to my wife, and *I. S.* and after shee dye, now I shall not have this terme, but *I. S.* for the terme was not drowned. But by a Feoffement or new Lease, I might in her life time have given away her interest. *Plow.* 418.

If two Femes sole be Join-tenants of a terme, and I marry one of them, and shee dye, now shall her Join-tenant, and not I shall have the whole. But if it had been a personall chattell, *Contra*, for the Join-tenant hath the elder title. *Plow.* 418.

So if a Terme be granted to my wife, and a Stranger, or were granted to my wife, while she was sole, and a stranger, and she dye. In this case I shall not have her moytie, but it doth survive and go to the stranger. *Plow.* 418.

If one be bound to a Feme sole for money, in an obligation and the day of payment happen during the Coverture, and the Husband do not release it, or sue for, and recover it, in his wifes life time, as he should, in his owne and his wifes name, or if the day of payment happen, after the death of the wife, he shall not have it, but the Executor of his wife, which shee may make him by his agreement, or the Administrator of his wife, which he may be, if he will. *F. N. B.* 121. 7. *H.* 6. 2. 49. *Ed.* 3. 23. *Co.* 451. 39 *H.* 6. 27.

The wife shall have againe to her selfe after the death of her Husband, all the Chattells reall, that her Husband had by her and did not by act executed during the Coverture, dispose or alter, (And what shall be an alteration of such chattell, see in the next division.) Also all such chattells reall, whereof they were joyntly possessed; As if any wardship or lease for yeares were granted to them two; now the

the wife ſhall have the whole, unleſſe the Husband have by act executed, diſpoſed it. *Coo ſuper Litt.* 46. 351. *Coo.* 10. 51. *Plow.* 191. *Fitz. Joinder in Action*, 20.

If a man be poſſeſt of a terme of Forty yeares in the right of his wife, and make a Leaſe for twenty years reſerving thereupon a Rent, and then dye, though the Executors of the Husband ſhall have the Rent, yet the wife ſhall have the reſidue of the terme after her Husbands death, for a diſpoſition of part is not a diſpoſition of the whole, but if there were a clauſe of Reentry for not paiment ſhe may not reenter by this. So if a Leaſe be made to them Two, for yeares during the Coverture, and he do not diſpoſe it in his life time by act executed, the wife ſhall have it all. And regularly that which her Executor or Adminiſtrator ſhall have after her death, (*For which, ſee the laſt diviſion*) ſhee ſhall have after her Husbands death; As all the goods and chattells ſhee hath in *Auter Droit*, not diſpoſed by her Husband. All chattells reall conſiſting meerly in action. All Chattells perſonall alſo conſiſting meerely in action, not recovered by him in his life time. *Coo. ſuper Litt.* 46. 351. *Cook ſuper Litt.* 351. *Plow.* 294.

Alſo ſhee ſhall have all chattells reall, that are of a mixt natvre, *viz.* partly in Poſſeſſion, and partly in action which happen during the Coverture: As if the Husband be ſeiſed of a Rent ſervice, Charge, or Seck in the right of his wife, and the Rent became due, during the Coverture; ſhee ſhall have it, and not his Executors. So if he be ſeized of an Advowſon in right of his Wife, and the Church become void, during the Coverture, and he dye, ſhee ſhall have it. 14. *H.* 4. 12. *Coo. ſuper Litt.* 351.

If an Eſtray happen within the mannor of the wife, if the Husband dye before ſeiſure, the wife and not the Executors of the Husband, ſhall have it, for the property was not veſted in the wife till ſeiſure. 10. *H.* 6. 11. 43. *Edw.* 3.

If one be bound in an Obligation, or promiſe, or Statute, to a Feme ſole, who after takes a Husband, or to the Wife or to the Husband and Wife during the Coverture, and the Husband dye before he Recover or Releaſe it, the Wife not his

Executors shall have it. *F.N.B.* 121. 7 *H.*6. 2 46. *Ed.*3. 12.

If a Rent be granted to a man and woman sole for twenty one yeares, if the Grantor shall live so long, and after they inter-marry, and then Arrearages incurre, and then the Husband dyeth and then more Rent is behind: now the wife and not the Executor of her Husband shall have the Arrearages before and after her Husbands death. *Curia B.R. Burgentense. Hill.*22. *Iac.* 33. *H.* 6.20. 39. *Ed.*3.19. *Hill.* 7. *Eliz. B.R.*

If a Husband be seised of Rent in the right of his wife, and the Rent incurre, and the Husband dyeth, the wife and not the Executors of the Husband shall have the Arrears. *Per* 3: *Inst. B.R.*22. *Iac. Hill.* 9. *H.*6. 43. 29. *Ed.*3 40.

If a Lease be made to a Husband and Wife, for terme of their lives, the remainder to the Executors of the Survivor of them, and the Husband dye, the wife and her Executors shall have it; And this the Husband could not grant away from her, because it is but a possibility, and no intereſt. *Hill.* 7. *Eliz. B.R. Co. super Litt.* 46.

If they two get a Judgement against a man for damages, and he dye, the wife shall have all the damages, 48. *Ed.*3. 12.

If an obligation be made to them two during the Coverture, and he dye, shee shall have it, and not his Executors. 3. *H.*6. 37.

If a Feme sole sow her Land, and after marry, and he dye before severance, the Wife, and not the Executor of the Husband shall have it. *Bro. Emblements*, 26.

If Husband and wife have a manner to them, and the heirs of the Husband, and a tenant by Knights service dyes, his heire within age, and after the Husband dyes, the wife and not the Executors of the Husband shall have the wardship. So of a presentment to a Church. 1 *Mar.*

This word *Paraphernia* is used in our Law, but in the civill Law, the thing is said to be *Paraphernalia*, which by the Civilians is said to be something which the wife hath to her selfe besides her Dowry which her Husband gave her, the which shee must have, and not the Executors of the Husband. And of which the Wife may make a Will without the assent of her

her Husband, as being a thing in the free disposition of the wife. And this both by the Civill and the Common Law is all the necessary furniture and apparrell of a womans body provided her by her Husband which may extend to many Garments of the same kinde, and is not to be restrained to one garment only which is, that is sufficient to cover the body, and yet not to be extended to that which is above her degree, and therefore Jewells and Chains of Gold and Silver shall not be esteemed *Parapherna* for a Husband-mans wife: but these may be *Parapherna* for the Wife of a noble man: But what shall be allowed for *Parapherna* is to be decided by the Judges, and they do use to give a greater allowance where are no debts of the Husband to pay then otherwise. And *Omnia hæc bona mulieris*, are said to be *Privilegiata & de Paraphernis non debet maritus intromittere in vita uxoris*, neither is he to devise them at his death. (*b*) And as touching these, it is out of question, that if the Husband dye, the Wife and not the Executor nor Administrator of the Husband shall have them. (*c*) And that with the consent of her Husband shee may make a Testament of them and devise them. But not otherwise as it seems by our Law, because the property and possession is in him, And yet by the Civill Law she may devise them, and make an Executor of them without the Husbands consent. 18. *Ed.* 4. 11. 12. *H.* 7. 23. 33. *H* 6. 31. *M.* 27. 28. *Scaccar and the Lord Treasurer and other five Executors of Viscount Binden, against Viscountesse Binden Fitz. Trec.* 24. *F. executor.* 19. (*b*) 37. *H.* 8. 28. *Fitz. Adminis.* 7. *Br. Adminis.* 31. 33. *H.* 6. 31. (*c*) *Br. Testament* 13. 18. *Ed.* 4. 11. 12. *H* 7. 23. 24.

What portion the Executor of the Husband shall have them.

All the chattells personall the Wife had in her own right, at the time of the taking her Husband shall not after the death of the Husband go to the wife againe, but shall go to the Executor or Administrator of the Husband, as his other goods and chattells. *Co. super Litt.* 351.

If the Husband and wife be ejected of a terme, which the Husband hath in the right of his wife, and the Husband bring an *Ejectione firme* in his owne name (as he may) and recover it now by this the Terme is altered, and is become the Husbands owne in his own right, and after his

death ſhall go to the Executor of the Husband and not to the wife. *Plow.*415.37-*aſſi:Pl.*11.*Coo.ſuper Litt.fo.*46.6.

If the Husband grant the whole terme upon condition, that the Grantee ſhall pay a ſumme of money to his Executors and the Husband dye, and the condition is broken, and the Executor enter, now this is a diſpoſition of the terme, and the Executor ſhall have it. *Coo.ſuper Litt.f.*46.

Where the Husband ſhall be charged for the debt or duty of the wife in treſpas, or other thing done by his wife, where not,

The Husband during the Coverture is liable and ſubject, to all Suite for any cauſes or wrongs by the wife before the marriage or after, during the Coverture as Debts, Covenants, ſlanders, treſpaſſes, and the like. So as the Husband and the wife be both joyned in the ſuit, and the ſuit be begun, and judgement had in it during the Coverture. For if either the wife be ſued alone, or they be both ſued, and one of them dye, before Judgement obtained, the Suite faileth. And therefore it is that upon an Indictment againſt the wife alone, for a treſpaſſe, Ryot, or the like, If ſhe be to pay Fine, forfeiture, or be impriſoned, the Husband ſhall not be charged with it, unleſſe it be ſo appointed by ſpeciall words in a Statute, but her body muſt ſuffer, and the Fine or forfeiture ſhall be levied of her, if ſhee ſurvive her Husband, for a Husband ſhall never be charged, for the act or default of his wife, but when he is made party to the action and Judgement is given againſt him and his wife. But if the ſuit be by information upon a penal Law againſt Husband and wife, there he may be charged. *Coo.*11.61 *F.N.B.*83.121. *Kelw.*61.*Coo.* 8. 148. *old Laured Entries f* 6.*Coo.*11.61.9.72,

During the Coverture

But regularly he ſhall not be charged with any contract made by his wife during the Coverture, (yet *vide Aſcuns exceptions & plus infra.*)

After the death of the wife.

If the Husband have a Leaſe in the right of his wife, Rendring rent, and the Rent behind, during the Coverture, and ſhee dye, in this caſe, he may be ſued for this Rent, after her death, alſo as Executor to his wife, if he ſuffer her to make a Will, and make him Executor, and he prove it, here he may be charged, where otherwiſe he would not be. *Kelw.*61.10.*H.*6. 11.*Brot. conſultation* 5.

If ſhee (being ſole) had held land by wrong, and after mar-

ry

ry, and the husband continue the occupation; now for this continuance of the wrong, he may be charged, after her death, and both of them together in her life might have been charged for her occupation before the marriage. *Plow.* 192. *F. N. B.* 120. *Kelw.* 60.

If the wife hold Land, for which by custom a Heriot(i) the best goods of the tenant ought to be paid, and shee dye, the best goods of the Husband shal not answer it, without there be a speciall custome for it. *Curia M.* 8. *Car. B. R. Chanon et Kings case.*

If the Husband give the wife power to contract for him, and shee make a contract and dye, the Husband may be charged for this contract after her death, and without such power, he may be charged for her necessary apparrell, or for the goods shee bought that came to the use of the Husband, and he agreed to it afterwards. *F. N. B.* 120. *G. Fitz.* 41. 160. 163.

But the Husband shall not be sued for any debt shee did owe before the marriage after her death, unlesse judgement were had in her life time, and after marriage shee could not contract but by his appointment. *Fitz.* 119. *Ritch. fol.* 187.

Where and in what cases the act or neglect of the Husband alone before the Coverture shall or shall not binde the Wife and others and the power of the Husband alone.

The Husband alone may make an estate of any of the Lands he hath, in the right of his wife, during both their lives, without her consent and agreement. *Experiencia.*

If an estate in Fee-simple, Fee-taile, or for terme of life, be made to a Feme Covert, or to the Husband and wife, the Husband alone may disagree to it, and avoid it, for both. *Litt. Sect.* 671. 1 *H.* 7. 10. *Coo.* 8. 72. *Dyer.* 51. 5. *H.* 7. 32.

If Lands be given to them two, and the heirs of their two bodies, the Husband alone may levy a fine and bar their issues, and her also, if she do not make her claime or entry, within five yeares after the death of her Husband. *per le Statute de* 23 *H.* 8. *cap* 28.

If a woman have an estate for her life, as tenant in Dower or otherwise, and her Husband alone, or he and his wife do by Deed, surrender it to him, in reversion, this is good during the Coventure, but if shee survive, or there be a divorce, *Causa precontractus*, the wife may enter and defeat the surrender, though he to whom it was made be dead, and his heire be in by descent; But if the Husband and wife surrender by fine, this is good and will binde the wife. *Perk. fo.* 117.

And

And generally all things done by the husband voluntarily, and out of Court, which he and his Wife are compellable to do, shall be deemed both their acts, and good; As if hee being seysed in his Wives, or joyntly with his Wife, assign dower to another woman, grant a rent for equality of partition, or make an Attornment, this shall bind her, though it be done by him alone.

If a Feme sole make a Feoffment in fee, or condition to pay ten pound to the Wife at *Easter* next, and before the day she take a Husband, the husband may release this condition, and barr her for ever. *Perk. sect.* 764.

A man may make any waste, or spoyl, pull down the houses, or cut down the timber of all those Lands that are his Wives Inheritance that he holdeth in her right, and her heirs have no remedy, for the husband hath the fee-simple of the Land in her right. 43 *Ed.* 3. 26.

If a Feoffment or other estate be made to a Feme sole on condition, and after she take a husband who doth not perform, or break the condition, and so forfeit the estate, the wife is barred and bound by this: So likewise upon a condition in Law, as if the husband doth commit *waste* in his wives land (*See Infants*) 20 *H.* 6. 28 *Coo.* 8. 44.

If a Feme sole have a Right or Title of Entry into Lands, and after the same accrued, she take a husband, and he suffer a dying seysed, this doth barr her of her entry. *Litt. sect.* 404.

If a man have a right or title of entry into Lands, and after marry a wife, and do not enter during the Spousals, that the husband may have an entry in Fait or in Law; now by this neglect of the husband, the wife is barred of her dowr. *Perk, sect.* 366, 367. 370. *Coo.* 246. *super Litt.*

If a lease be made of two acres for life, the remainder of one acre to a *Feme sole*, and she take a Husband, and the Tenant for life dye, and the husband doth make election of one acre, now this election shall bar and bind her, and she shal not choose again. *Perk, sect.* 76.

If they two levy a Fine of her Land, and the husband alone declare and limit the uses, this is good, and will bind the wife

if

if her disagreement thereunto be not proved. *Co.* 2. 137.

If a Co-partner be marryed, and for equality of partition the husband and wife grant a Rent to the others out of the part of the *Feme Covert*, this being equall, shall bind the *Feme Covert* for ever, and neither she nor her heyrs shall avoyd it. 29 *Ass.* 23. 17 *Ed.* 3. 10.

If he be attainted of Felony, he doth hereby forfeit the profits of her free-hold land during the Coverture. *Co. super Litt.* 351.

If the Husband and Wife be Joynt-tenants, and he be in debt to the King, the King will have this Land in execution. (See more in *Dower & Discontinuance*) *Plow.* 321.

If he give or grant away any of her Chattels reall, by act executed, this will bind and barr the Wife: And therefore if a man be possest of a tearm in the right of his wife, if he in the Reversion confirm the state of the Husband and his wife, to have and to hold the Land for tearm of their two lives, by this confirmation her lease for years is gone and drowned. *Co. ut supra Plow.* 199. *Litt. sect.* 526. *Co.* 9. 129, 10. 47. *Dyer* 264.

If the wife have any future interest, or interest *termini*, the Husband alone during the coverture may by Release barr her of it. *Co.* 10. 47.

If she have any goods or Chattels as Executrix, and the Husband sell and dispose it by act executed; this will barr and bind her: Also he may during the coverture release any debt, confesse any action, or do any thing as Executor may do, and it shall bind her. *Bro: grants* 157. *Kelw.* 122. 21 *H.* 7. 24. *Co.* 5. 27. *Kelw.* 163.

If an Obligation be made to her during the Coverture, the Husband by his disagreement may avoyd it. 48 *Ed.* 3. 12. 7 *H.* 6. 1.

If a Statute or Obligation be made to them two, or to her alone, during the Coverture, and the Husband alone make a defeasance, or release it, this will barr the wife. *Plow.* 260. *b. Co: Super Litt.* 351.

If she have cause of action for debt, duty, battery, slaunder, trespasse, or the like, the Husband alone may release it during

during the Coverture, and barr his wife. *Kelw.* 92. 20 *H.* 7. 5.

If the Husband be outlawed or attainted, hereby the chattells reall of the Wife are forfeyted, for this is a gift in Law. *Plow.* 360. *b. Coo. super Lit.* 351.

Upon an Execution against the Husband for his debt, the Sheriff may take and sell a tearm the Husband hath in right of his Wife during her life. 26, 27 *Eliz. Anner & Loddington Adjudg en amtalez Court: Coo. super Lit. f.* 351.

The Husband alone may make an Attorney for him and his Wife, or cast a protection, and she cannot disavow or avoid it. 33 *H.* 6. 43. 35 *H.* 6. 3.

If the Husband do attorn voluntarily in case where by the Law he might have been compeeld to it, this will bind the wife. *Coo.* 9. 85.

If a Feme sole, an Executrix take a Husband, and he put himself in arbitrement for the debt of the Testator, and an award is made, and he dye, now the wife cannot avoyd it. 20 *H.* 7. 29.

If the Husband forfeit Issues and dye, those Issues shall be levyed of the Land of the VVife. *Doct. & Stu.* 38. 12. *H.* 7. *t.*

If the Husband claym fee in a *Quid juris clamat*, or disclaim an Avowry, so that the Lord recover, the wife is without remedy, *per Martin.* 9 *H.* 6. 52.

If a lease be made to Husband and VVife for life, and the Husband commit waste, and dye; now if she continue the possession, she shall be subject to an action for this; but *contra*, if she wave the possession. 21 H. 6. 24.

If the man that is Copy-holder in the right of his wife do alien without Licence, or otherwise commit a forfeiture, the estate is forfeit: So if the wife be Tenant for life, and her Husband make a Feoffment. *Per Inst. Dodd. Trin.* 21 *Jac.*

Where, and in what cast not.

The Husband alone cannot by Fine, Recovery, or otherwise dispose his wives land for longer time then for their two lives together, unlesse it be in some speciall cases, as upon the Statute of 32 *H.* 8. (which see in Leases) or the like: And

if

if he doth alien or grant it for longer time, she may be relieved by a *Cui in vita* (which see *infra*) or she or her heyr may enter by the Stat. 32 *H.* 8. *cap.* 28. And although the money given for the Land that is sold be paid to her, yet this doth not help the matter at all. 17 *Ed.* 4. 14.

If a joynt estate be made in Fee-simple, or for life to the Husband and wife, the husband alone during his wives life, cannot by Judgment surrender, or otherwise sever this joynture, or dispose any part of this Land longer then for their joynt lives; but if it had been made before the marriage, *contra.* 19 *H.* 6. 45. *Dyer.* 9.

If the husband doe commit waste in the freehold of his wife, and dye before the writ brought; now neither the wife nor the land shall be hurt by it, but after his death they be discharged. 2 *H.* 4. 3. 29. *Assis.* 47. *Doct. & Stu. f.* 29.

If the husband and wife in the right of the wife have any right to enter into Lands acrued to them during the Coverture, and the husband suffer a descent, and dying seysed, this shall not hurt the wife, but after her husbands death shee may enter. *Litt. sect.* 433.

If the husband levie a Fine, or make a Feoffment of the Land he hath in the right of his wife, this will not prejudice her after his death, if she avoid it in time; but if it be by Fine, she must enter or claim within five years after his death, or she may be barr'd. 39 *Ed.* 3. 29. 29 *Ass. p.* 43. *Jus. Fines Co.* 8. 72.

If the husband be seised of a Reversion in the right of his wife, and he grant it away, and the Tenant attorn, yet this will not bar the wife. 19 *H.* 6. 4.

If a Lease be made to husband and wife of land, which are chargeable with Damages, or more Rent then it is worth; if she after his death refuse the occupation of the land, it seems she shall not be charged with damages or Rent. *Doct. & Stu. f.* 120.

If the husband and wife levy a fine of the Land of the wife, and he declare uses alone, and she disagree to it, and make it appear, by declaring other uses, or the like: now in this case

the Declaration of the Husband, will not barr nor bind the wife. *Coo.* 2. 57.

If the Husband discontinue his wives land, and go beyond Sea, and the Discontinuee letteth it to the wife for life, and giveth her livery, now hereby she is remitted, and the Husband by his disagreement afterward cannot avoid it. *Lit. sect.* 677.

If he be attainted of felony, this doth not forfeit any freehold estate of his Wives, but the profits only during the Coverture, and no longer, for the state remaineth still in the wife. *Coo. super Litt.* 351.

If a Lease be made to a Husband and VVife for life, and the Husband alien the land in fee, or in tayle, now the Lessor may enter for a forfeiture; but if the wife survive, she may recover it by a *Cui in vita.* 11 *Ass. p.* 11. 43. *Ass. p.* 11. *Broo. Cui in vita* 9, 10.

If he that is an Accomptant to the King by reason of the receipt of the Kings money, purchase Land after to him and his VVife in fee, in tayl, or for their lives, and after the Husband dye, in this case it seems the VVife shall not answer for this debt with this Land: But if he were debtor to the King before the purchase, *Contra. F. N. B.* 150. 217. *Dyer* 225. *Crompt. Jur.* 102 *b.* 110 *b.* 131.

If a woman have Land by descent or purchase, soly, or with another, and her Husband alien it to a stranger, this bindeth her and her Husband whiles he lives, and by the Common-law she might not have entred after his death, but must have had her *Cui in vita*: But now by the *Stat.* 32 *H.* 8. It was provided that no Fine, or other act of the Husband only, of any Land that is the Inheritance or free-hold of the wife, shall be any discontinuance or hurt to the wife or her heirs, &c. after her Husbands death, but that she or they may enter notwithstanding, if shee will. *Stat.* 32 *H.* 8. *cap.* 28. *Cop.* 8. 72.

If the Husband by his last will devise a tearm he hath in the right of his Wife, this will not hurt her, for this Devise is voyd. *Coo. super Litt.* 351. *Plow.* 418.

If the Husband grant a Rent out of Land he hath an estate of for years in her right, and after dye, this will not hurt her, for this will not bind the Wife. *Dyer 6. Co. idem 7 H. 6. f. 2. Plow.* 418.

If a leaſe be made to Husband and Wife for years, the remainder to the ſurvivor of them for one and twenty years, the Husband alone cannot diſpoſe of this remainder to barr his Wife: So if a leaſe were made to them for lives, with ſuch a Remainder for yeares, the Husband cannot grant it away. *Co.* 10. 51.

If a Uſurpation be ſuffered by the Husband in the Advowſon that the Wife hath by deſcent, this ſhall not prejudice the Wife, but ſhe may after her Husbands death have a *Quare Impedit*, or *Aſſiſe*, or *darrein preſentment* for the Preſentment: But if ſhe have it by purchaſe, *contra*, for there plenarty is a barr to her if it be ſix monethes; The Husband cannot touch by Eſſoyn, if the wife by covin of the Plaintif ſhall appear. *Co.* 6. 50. *a b.*

If a woman Leſſee for life take a Husband, and being impleaded, they pray in ayd of a ſtranger, and the Husband die, now this ſhall not hurt the Wife, for he in Reverſion cannot enter. 15 *Ed.* 4. 29.

If the Husband and Wife demiſe his Wives land by Indenture according to the Statute of 32 *H.* 8. rendring 20 *s.* rent, and after the Husband releaſe all his right except 12 *d.* *&c.* Or grant that the Leſſee ſhall hold it diſpunishable of Waſte, and then dye, now ſhe is not bound by this: And though ſhe accept the 12 *d.* yet ſhe may have the reſt, or bring an action of *Waſte*. *See more, Remitter, Acceptance, Warranty, Leaſe, Fine. Dyer* 504.

If a man deviſe that his Executor ſhall ſell his Land, and make a Feme Covert his Executor, in this caſe ſhe may ſell this Land without her Husband, or ſhe and her Husband may ſell it together: So if one deviſe Land to a woman to diſpoſe thereof at her will and pleaſure, and to give it to one of her Children, ſhe alone may make a Feoffment to any of her children during Coverture, for ſhe is but an Inſtrument. *See Kelw. fol.* 10. *Trin.* 2 *Carol. Uply & Daniels caſe, B. R. curia.*

where and in what caſe the act of the Wife alone during the Coverture, ſhal bind, where not, and the power of a feme Covert.

Cey que use had made his Wife his Executrix, and deviſed that ſhe ſhould ſell his Lands, and the woman took a ſecond Husband, and then ſold the Land to him, and this was reſolv'd to be good: So if a Feoffment be made to a Feme Covert on condition that ſhe ſhall reinfeoff, and ſhe alone reinfeoff, this is good, and neither the Husband in his life, nor the Wife after his death may avoyd it. *Plow.* 4.14. 34 *Ed.* 3. *Cui in vita.* 19.

If Lands are given to a woman on condition to ſell it, and diſtribute the money for the Feoffees ſoule, and ſhee take a husband, and they two ſell and do diſtribute, now this is good, and there is no remedy for the woman after his death in Law nor Conſcience. 10 *H.* 7. 20. *Womans Lawyer, fol.* 124.

If ſhe alone doth levy a Fine of her own Land, it will be good, and barr her ſelf and all others, if her Husband do not avoid it in his life time. *Coo:* 10. 43. 32 *H.* 6. 31. *Crompt: Jur:* 100.

If ſhe be attainted of felony before any Iſſue had by her Husband, the Lord by Eſcheat may enter preſently, and put out the Husband, but after her husband hath Iſſue by her, *Contra.* 4 *Aſſ. p.* 4. 4 *Edw.* 3. *Fitz: Aſſiz.* 166 *Coo: ſuper Litt:* 665.

If ſhe be an Executrix or Adminiſtratrix, ſhe alone may receive Debts due to, or pay Debts or Legacies due from the Teſtator, ſo it be done duly, and not in prejudice of her husband, and the reſidue ſhe may give for Gods ſake, maugre the teeth *ſa barta*; but if ſhe deliver any goods before Debts payd, her husband may have an action of Treſpaſſe againſt the taker. But *Quere* for Legacies, for *M.* 19 *Jac:* *Coo: B. inter Wats & Goldsborrow*: It was held that a *Feme Covert* cannot deliver or aſſent to a Legacy without her huſband. *Coo:* 5. 27. 2 *H.* 7. 15. 18 *H.* 6 *Perk. f.* 2.

A Feme Covert may by the Licence precedent, or agreement ſubſequent of her husband make a Will, and make him Executor alſo, if ſhe will. And by this meanes the debts due to her, and damages for goods taken away, or other wrongs done, *Dum ſola fuit* may be recovered by him, Alſo ſhe may make

make either a ſtranger, or her husband, her Executor, as to all ſuch duties as were due to her before marriage, which are in action and not in poſſeſſion; As if when ſhe were ſole, ſhe had made a Leaſe for her life rendring Rent, and the Rent is in areare, and ſhe marrieth: or ſhe being Exeutrix and had many debts owing her or otherwiſe. And if ſhe make a Will without his leave, and make *I.S.* her Executor, and her husband do by word agree to it afterwards, or after *I.S.* have proved the Will, do deliver him the goods ſhe deviſed, this makes it a good will. *Broo. Teſtament* 10.12 *H.*7.22. *Womans Lawyer fo.* 124. *Perk. fol.* 97.

A wife alone may contract for her own neceſſary wearing Apparrell, and the Husband muſt performe it, unleſſe it be in caſe where he have before forbidden the ſeller to deale with her, or let her have any: Alſo if the wife buy unneceſſary Apparrell, and the Husband do after agree to it, this will bind him 11.*H.*6.38. *Dyer* 234. (*a*) *Trin.*14 *Ja. Banco Sir Will. Gards caſe.*

If ſhe alone buy any thing that comes to the uſe of the Husband, though ſhe had no ſpeciall authority for it before, if the Husband after he do heare of it, do agree to it, this will bind him. And ſo it ſeems of any thing elſe, for ſhe may give, ſell or charge any of her Husbands goods or chattells by his conſent, and if ſhe have done it without, yet if he do afterwards agree to it, this makes the contract good, whether it be to his advantage or not, but his conſent will not make a feoffment made by her of her own Land good. *Old N.B.*62. *Dyer* 234. *Fitz. Deb.*120.163.11.*H.*6.*fo.*38.27 *H.*8.24.

A Feme Covert may be a *Diſſeiſereſs* without aſſent of her Husband, and he ſhall be charged with dammages in an Aſſiſe.

Some hold that ſhee alone may ſue in the Spirituall Court for a defamation, and that the Husband cannot releaſe it nor that any prohibition lyeth againſt her *Sarah Edwards* caſe 7.*Iac.B.R.*

A Feme Covert may take an *Aſſumption* from any man, for her Husband, ſhe may take an Obligation or Feoffement in her own name, and it will be good, untill he diſagree to it.

If

If the Husband and the wife wage their Law, &c. and have day given, and the wife do not appeare at the day, he shall be condemned.

Where not A Feme Covert alone can do nothing during the Coverture, with any her lands, goods, or chattells, she hath in her owne right without her Husband, for that shee is, *Sub potestate viri et omnia quæ sunt uxoris, sunt ipsius viri & res licet sit propria uxoris, vir tamen ejus custos tum sit caput mulieris, & non habet Uxor potestatem sui sed vir.* Therefore all Feoffements, Deed, Gifts, and Grants, by her alone, are void, although shee say in the Deed she is sole, and not married, and although they be executed by livery of seysin, or attornement, And although the Husband know of it. *Benet lib. 2. cap. 15. Coo super Litt. 112. 14. H. 4. 29. per cap. 41.*

(*b*) A Devise by her of her Land by Will is void (*c*) If a Feoffement be made to her, she shall take nothing untill he agree to it and a bare *Verball* agreement of the Husband will avoid it (*d*) And if the Husband be vagrant, have not been in the Countrey a great while and shee know not whether he be dead or alive, and she Reckoning that she is sole, grant a Rent charge out of her Land, yet this is void, and if the Grantee enter and distraine for the Rent, the Husband may have an action of Trespasse against him. (*b*) *Dyer* 554. & 34. *H. 8. cap* 5. 1 *H.* 7. 16. (*d*) *Perk. fo.* 2.

She cannot give or sell his goods or chattells by contract or bargaine without his authority generall or speciall precedent And if she do, it is voyd, neither can she give them by Will, without his agreement precedent or subsequent. *Dyer* 234.

If she enter into any Bond, Statute, or Recognizance, alone without her Husband, they are voyd and will not binde him, she alone cannot release any debt due to her, as Executor or otherwise, *Co.* 10. 43. *Kelw.* 10. 16. *H.* 7. 5. 1 *H.* 3. 12. 1, *H.* 7. 13. *Co.* 5. 27. *Kelw.* 12. 21.

If she buy or make any contract for goods, and to pay mony, without his authority, this will not binde him, albeit the things bought do come to the use of his house, unlesse he do afterwards agree to it. *Dier* 234. 21 *H.* 7. 40. 11. *H.* 6. 38. *F. N. B.* 61.

If

If she contract for Apparrell, more then is needfull, and that is superfluous, the Husband shall not be charged with it nor bound by it. 11. *H.* 6. 38.

If mony be to be paied to me upon Bill, or Bond, or Rent on a Lease, and it be paied to my wife, and shee accept it, this will not prejudice me if I after disagree to it. But if I once agree, the payment is good. And untill I do disagree, the Law doth conclude, I do agree and allow of it, and although it be a Rent that was hers before the marriage, yet it is all one. *Adjudge Sir Paul Tracy's Case in* 19. *Jac. B. R.*

She cannot sue, nor be sued, without him, nor plead any other Plea then he doth in a suit, unlesse it be in some speciall case where he is dead in Law. 33. *H.* 6. 31. 2. *H.* 7. 15. *cui in vita.* 3. 1 *H.* 4.

She cannot be Executor without her Husbands agreement, nor being so, may do any Act that might be a *devastavit* of the goods without him. *Co.* 5. 27. 33. *H.* 6. 43.

She shall never be receaved to disavow the suit of the Husband and her selfe. 39. *Ass.*

The husband and wife may joyn together, and by Fine or common Recovery (where she is excluded) make a good assurance of any Land she hath any free-hold Estate in, and barre her of her title and right of Dower or Jointure into her present Husbands Land, and so by a Recovery suffered by Husband and wife, in Lands she may passe her Land. But they cannot do it by Deed indented (no though after it be inroled) Feoffement, nor the like, unlesse it be by speciall custome. And where she doth joyne with him to levye a Fine, or suffer a Recovery, she is to be examined by him that taketh the Conusance of the fine or the Recovery. Sta. 18. *Ed.* 1. But if they be both within age at the time of the levying of the Fine, they may at their full age avoid it by Writt of Error. *Ann. in Sys case.* B. R. 29. *Eliz. Dott. & stu. fo.* 179. *Co.* 10. 43. *Kalm.* 10. *Br.* 105. *Ebor.* 515. *Sacr.* 34. *H.* 8. *cap.* 22. *Crompt. Jur.* 100. *&c.*

If a Partition or exchange be made by Deed of her Land, between the Husband and wife, and another, and she agree to it after her Husbands death, this is good, and will bind her. 12. *H.* 7. 8. *Co. super Idem fo.* 171.

where & what acts they both may do during this Coverture, and the power of the Husband and wife together, and where not.

The

The Husband and wife together, may make a Leaſe of the wifes Land, rendring a Rent, and if ſhe after his death accept the Rent, by this the Leaſe is affirmed, and the wife cannot avoyd it: (*See Acceptance*)

They may by themſelves or by Attorney make a Leaſe of her Land to try a title, and ſuch a Leaſe is good without queſtion. *per Juſt. Jones Summer Aſſizes at Glouc. 9. Car.*

If they two be ſeiſed of any eſtate of Inheritance in Fee-ſimpl or Fee-taile, Jointly before the Coverture or after, or if the Husband be ſeiſed of any ſuch eſtate in the right of his wife, they two may make Leaſes for three lives or twenty one years to binde their iſſues, or heires by the *Stat.* 32. *H.* 8. *cap.* 8. and this may be without Fine or recovery by a Deed in the Country (See Leaſes) *Co.* 506. 6. 37 *Co. ſuper Litt. f.* 44.

If the Husband have a Coppyhold eſtate in fee, or for life within a mannor in the right of his Wife, they two may make a good ſurrender of it, and ſo ſell it (*a*) But it ſeems in the caſe the wife muſt be excluded in the Court there before her ſurrender be taken. *Co.* 4. 23. 6. *Dyer* 344 *Raynolds caſe M.* 7. *Jac. B. R.*

Shee may with his conſent deviſe her goods, by his authority make contracts, *vide ſupra Dyer.* 334. *Co.* 632. 20 *H.* 6. 23, 21. *H.* 7. 40.

Whatſoever act ſhe being ſole might have avoided by her Infancy, ſhee and her Husband both may avoid by entrie or action after marriage if they take the time. *Litt. Sect.*

But though her Husband joyne with her they cannot grant that which is not graneable. As if the wife have the wardſhip of an Infant and of his Lands, by reaſon of a tenure in Socage, and ſhe and her Husband grant it, this is void. *Plowd.* 293.

And though her husband joyne with her, or give his conſent, yet ſhe cannot deviſe her land by Will. *Dyer* 344.

If the Husband and Wife both joyne in a Statute Recognizance, this will not bind the Wife nor her Land: *Rolls.* 10.

All acts done by a *Feme ſole*, that be countermandable, done to the diſadvantage of her Husband, if they be not executed

executed before the marriage, are countermanded by the marriage, whereof see *Countermand.*

But such acts as are done by, or to her, that are or may be for her advantage, are not countermanded by the marriage: So also such acts as are not countermandable: As if the Connusance of a Fine be by her whiles she is sole, and she marry before the recording and finishing of it, yet the Fine may goe on: So if a *Feme sole* deliver a Deed as in Escrow to take effect as her deed, after certain conditions performed, and before they be performed she marry, yet the conditions may be performed, and the Deed take effect according to the intent and agreement. *Dyer* 246.

where & what acts make a countermand by the intermarriage, and where, & what not.

If a *Feme sole* and another have a lease for years in Joyntenancy, and she take a Husband, yet the Joyn-tenancy doth continue and is not determined.

If a Lease at will be made to a *Feme sole*, and she take a Husband, this Lease is not determined. *Plow.* 418. *Kelw.* 61.

In some cases, and for some causes the Husband and Wife must joyn in the Suit: As if any wrong be done to the person, name, or lands of the Wife, before, or during the Coverture, or if the Suit be upon any Covenant on a lease made by the Husband and Wife of the Wives Lands, where the Covenant is made to them both: or if the Suit be for any Inheritance, as Lands, Commons, Advowsons, or the like, that doth belong to the Wife. 9 *Ed.* 4. 52. *Dyer* 305. 40 *Ed.* 3. 3. 21 *H* 6. 30. *Coo.* 5. 16. 97. 59.

where & what actions shall be sued and maintained by Husband and wife joyntly, & what the Husband shall have alone or joyntly with his wife at his election, where, and what not.

If an action of Debt upon arrearages of accompt (where one was receiver to her whiles she was sole) they must both joyne, and that though the Auditors were assigned during the Coverture in a writ of *Detinue* of Charters of the inheritance of the Wife, they must joyne.

If one have a terme in the right of his wife (and be outed of it) it seems they both must joyne in an *Ejectione Firmæ*. But quere, 47 *Ed.* 3. 12. *Plow.* 418. 16 *Ed.* 4. 18.

If Husband and Wife make a lease for yeares of the Wives Land, they must joyn in an action of *Waste*, else it is not good. 7 *H.* 4. 15. 3 *H.* 6. 53.

In trespasse, if the Plaintiff recover against the Husband and Wife by false verdict, they must both joyn in the attaint. But in some cases the the Husband must sue alone, and not joyn his Wife with him: As if goods be delivered by them both, the Husband alone must bring the *Detinue*: Or if an *Assumpsit* were made to the Wife to pay to the Husband money, the Husband alone must sue for it: If he sell any of his Wives land for money, he alone must sue for the money, or for any goods or chattels that were hers, he alone must bring the *Replevin*. But if the goods were his Wives as Executrix to another, there he may joyn her with him in the Suit: So likewise if the goods were taken from her, *dum sola fuit*. 48 *Ed.* 3. 20. (*a*) 27 *H.* 8. 24 8 *Ed.* 4. (*b*) 48 *Ed.* 3. 18. *Fitz. Reception* 37. *Ass.* 11.

If he have execution of a Statute made to his Wife, or she had execution before the Marriage, and he is afterwards ousted, he alone may sue for it. 27 *Ass. p.* 11.

If he sue for money promised him in marriage, he alone may sue for it: But he must be advised whether at the Common-law, or in the Spirituall Court, for which, see *Action sur le case* and *Prohibition*, and these cases. 22 *Ass: Pl.* 70. 45 *Ed.* 3. 44. 14 *Ed.* 4. 32. 17 *Ed.* 4. 5. 19 *Ed.* 4. 10. *English Lawyer*, 297.

If a lease for years be made, or wardship granted to a husband and wife, and they be disturb'd, the husband as it seems may sue alone, or he may joyn his wife with him. *Fitz: Joynder in Action* 20.

If the Wife have a turn to present to a Church, and the husband is let, he alone may sue for this. 50 *Ed.* 3. 13.

In trespasse upon the Statute 5 *Rich.* 2. the husband alone may sue, and so likewise for taking away Charters that doe concern the wives inheritance: So if he alone deliver such Charters.

And in some cases the husband may sue alone, or may joyn his wife with him at his election: As where an Obligation is made to them two during the Coverture: So if an accompt were to be made to her as her Receiver when she was sole: So if they two make a lease of their Land, and the Lessee make

make *Waste*: So a real action of the nature of Treſpaſſe for wrong done before or after the Coverture on the wives Land (u) wherein Damages only are to be recovered, and he alone may releaſe it: As where a Reverſion is granted to a husband and wife, and the Leſſee break her Covenant: So if ſhe have a Rent charge arrear before the Marriage: So if he have a Leaſe for life in her right, and he make a Leaſe for years, and the Leſſee do *Waſte*, and the husband have cauſe to bring an action of the Caſe: So if an Aſſize have paſſed againſt him and his wife, yet he alone may have the writ of *Champarty*: So if a man bring a writ of Raviſhment of goord upon a poſſeſſion *Jure uxoris*, he may bring it in his own name. If the husband be Lord in the right of his wife, of a Mannor, and they have cauſe to bring a writ of *Reſcous*, he alone, or both of them may ſue: And always where the action may ſurvive the Wife, ſhe may joyn in the Writ: And generally where the Husbands Releaſe is good, and will barr the Wife, or that which is in demand, or to be recovered, cometh meerly and only to the Husband, there he may ſue in his own name if he will, as where he ſueth one for chaſing in a free Chaſe, which he holds in the right of his Wife, or for Strayes taken of Lands holden in the right of his Wife, or for breaking of a houſe, and carrying away the timber of a houſe, or eating the Graſſe, *&c.* which is his Wives Inheritance: So in ſuch like caſes where damages is only to be recovered. *H.* 6. 37. 16 *Ed.* 4. 83. *H.* 6. 53. 43 *Ed.* 3. 3. 8. 26. 21 *H.* 6. 30. 7 *H.* 7. 2. 46 *Ed.* 3. 3. 8 *H.* 4. 21.

Where & what actions ought to be ſued joyntly againſt the huſband and wife, for a thing done by them during or before the coverture.

In ſome caſes where there is cauſe of action that doth concern a *Feme Covert*, the Suit muſt be brought againſt the Husband and the Wife, for in no caſe can the Wife be ſued in any action without the Husband, and in ſome caſes the Husband cannot be ſued without the Wife, as where the ſuit is for the recovery of any Land, whereof the Wife hath any eſtate of free-hold: So if one deliver goods to a *Feme ſole*, who doth after marry, the Husband and Wife muſt be both ſued. If the Husband doe commit *Waſte* in the Land he hath in the right of his Wife, the ſuit muſt be againſt them both: So if a man have cauſe to have an action of the Caſe againſt a

man that hath land in the right of his Wife for not reparation, whereby his Land was drowned, it must be against them both: So if a Lease be made to a Husband and Wife for years, rendring Rent, *Detinue* for the Rent or *Waste* must be brought against them both. 39 *Ed.* 3. 17. *Co.* 3. 11. 62. 5. 52. 1 *H.* 4. 31. 3 *H.* 4. 1.

If a *Feme Covert* find goods, and convert them to her own use, it seems the action must be brought against them, and not against the Husband only, if shee slaunder another, or beat him, or do any Trespasse or otherwise to him or his, the action must be conceived against them both. *Dyer* 355. 9 *Ed.* 4. 2. 4. 7 *H.* 7. 2. *M.* 31. & 32. *Q. Co.* 11. 61. *b.*

What not, but against the husband alone, and what the one way or the other at the election of the party who sueth them.

But in some cases the Husband must be sued alone, as if they two make an obligation during the Coverture, he alone must be sued upon it. *Co. Super Litt.*

If one be Guarden in Chivalry in the right of his wife, and a woman have cause to demand *Dower* out of the Land, he must sue the Husband only: So if the wardship were granted to the Husband and Wife: So if a Rent be granted out of the Land a man holds in the right of his Wife to another for his life, and it be arrear, and he dyes, here the action of Debt shall be brought against the Husband alone: So if a Wife be Guardion in Socage of the Lands of an Infant, and take a Husband, for the time before the Marriage, they must be joyned, but for the time after the Marriage will lye against him alone. *Fitz: Dett* 180. *Briff: Aff:* 561. *Briff:* 847. 930.

Where one of them shall answer without y the other, Iur. 44 Ed. 3. 1. 34 H. 6. 19. 36 H. 6 1. 43 Ed. 3. 18. 48 Ed. 3. 24. 26 Aff. p. 1. 3 H. 6. 9. 9 Ed. 4. 23. 9 H. 6. 8. 8. H. 4. 6. 21 H. 4. 8.

But an action of *Trover* and *Conversion* of the trover of the Wife it seems may be brought against the Husband and wife, or the Husband alone. *Drapers case M.* 1. *Jac: B. R.*

If one have a Ward in the right of his wife, and a woman have cause to bring her writ of Dower, she must have it against the Husband only, but if a writ of wardship be brought to recover a Ward, it shall be brought against them both because of voucher. 46 *Ed.* 3. 20.

And where the action is brought against the Husband and Wife, shee must be named Wife in the writ: But in no case may the wife be sued alone whiles the Husband is living, and known to be so, unlesse it be in some rare case whereof the

Husband

Husband for some offence is banished, &c. 42. *Ed.* 3. 23.

Causa Matrimonii prælocuti.

It is a Writ lying where Lands are given by a woman to a man, on Condition he shall take the woman to wife by a day, and before that day he doth disable himselfe, or at the day he doth not take her accordingly, then the Donee may have this Writ to recover the land againe. But this is now out of use. 1 *H.* 4. 2 *H.* 4. 7. 18. *Ed.* 4. 4. *F. N. B.* 205. *Cro.* 2. 15.

Cui in vita.

It is a Writ that lyeth where a man is seised of Lands in fee-simple, fee-taile, or for terme of his life in the right of his wife, and doth alien the same, and dyeth; Then the wife shall have this Writt to recover the Land so alienet. And if she dye before it be recovered, her heire may have a *Sur Cui in vita. Exp. Termes of the Law p.* 85.

How criminall matters done by them jointly or severally shall be construed, & how they shall be punished for them.

A Feme Covert may commit a fellony, and be principall or accessory, as another may, as if she kill a man, or steale goods, or receive stolen goods without her Husbands privity; And if she do so, she must answer it her selfe for her Husband shall suffer no corporall punishment for her. But if a Feme Covert steale any thing by the commandement of her Husband, or together with her Husband she shall be quit, for it is no fellony in her. *Contra* if she hold a man whiles her Husband kill him, and if she receive goods of her Husbands stealing, though she know it, she is not accessory, for she is not bound to discover her Husband. 15. *Ed.* 4. 1. 29. *Ass.* 40. *Stam. lib.* 1. *cap.* 19.

Any act that is high Treason in an other shall be so in her, & for this offence she is to be burned. So also for Petty Treason for the killing of her Husband. *Dyer* 332.

If a woman do commit any misdemeanour, as Ryot, Battery, &c. for which shee may be indited, and Judgement thereupon must be against her alone, therein she must answer without her Husband, and the Fine put upon her shall not be levied upon her Husbands goods in those cases, but her body must answer it, and the King must stay for his Fine untill she be sole; But in cases where for any misdemeanour made by any Statute, it is otherwise provided. *Co.* 11. 61. *b.*

Divorti.

It is the seperation of two married persons before coupled together, by sentence of a Judge, for it is impossible that after

persons

persons are lawfully married, they may by any agreement between themselves devide and separate themselves againe. *New termes of Law. Womans Lawyer. fo. 64.*

And this is sometimes *A vinculo Matrimonij (i)* which doth dissolve & make a nullity of the marriag from the beginning, and this is wehn the divorce is by reason of some essentiall impediment, as *Causa precontractus, causa metus, causa frigiditatis vel impotentia Causa affinitatis vel consanguinitatis*, and this divorce that is of this kind, which is perpetuall, makes such a nullity of the Marriage *ab initio*, that he may take any other wife, or she another Husband, that all the children had between them, during this marriage, are reputed Bastards, the wife shall have no Dower, the Husband shall not be tenant by the curtesie, they may sue one another. *Stat. 32. H. 8. 11. 38: Coo. 7. 45. 9. 141. Dier. 147. Rew. 164. Coo. super. Litt. 235.*

The other kind of Divorce is *a mensa & toro*, and this is when the Divorce is *Causa adulterij* or *causa professionis*, which is only till reconcilement be had, and doth not dissolve the Marriage, nor produce any of the effects aforenamed, so in this case the wife may be endowed, and the children inherit, notwithstanding. The Causes of Divorce, do sometimes precede, and sometimes succeed the Marriage, precede, as in all the Causes before, where there is any such Impediment; As if it be so that two be marryed, *Infra annos nubiles*, for this at their full age, they may be divorced: So if either of the said parties be, *inops mentis*, at the time of, and alwayes after the marriage. 47. *Ed. 3. in Inir. 39. Ed. 3. 32. 19. assi. Pl. 2.*

Causes thereof

Causa consanguinitatis & Affinitatis.

If two be married that be within the degrees of consanguinity or affinity forbidden, this is cause of Divorce. As if a woman do marry, her grandfather, father, sonnes sonne, or Brother of the Whole or of the halfe blood, her Father or her Mothers Brother, her Brother or Sisters sonne, Brother or Sisters children, or a man marryed the Widdow of his Grandfather, Father, sonne, sonnes sonne, the widdow of his Brother or Brothers sonne, or his Brothers sonnes sonne, nor with the Grand-mother, Mother, Daughter, Neice, great Aunt or Syster of his Deceased wife. *English Lawyer fo. 71. Stat. 25. H. 8. cap. 22. Womans Lawyer.*

If

If one be a professed infidell, and thother a professed Christian, it seems this is cause of divorce. *Causa professionis.*

If either of the parties at the time of marriage be *inhabilis* unable and unfit for procreation for this cause the parties may be divorced, and then after marriage to others, good, but it seems it must be such as was at the time of the marriage for if it happen after marriage it is no cause. *Co. 5. 98. Dyer 179. English Lawyer. Co. 6. 66.* *Causa frigiditatis.*

If one have contracted marriage before with another, now this is sufficient cause of divorce of a latter marriage with another after this precontract. See the *Stat. 32. H. 8. ca. 38. & 2. & 3. Ed. 6. ca. 3.* *Causa precontractus.*

So also if a marriage be made through feare, or upon any such corrupt termes as before, this is cause of Divorce. *Causa metus.*

Some causes also do succeed the marriage, as when it is for Aultery or fornication which by the Canon is carnall and spirituall for they dissolve Matrimony, when one of the parties is converted to Christian faith, and thother being an infidell, will not live with him, out of the *1 Cor. chap. 7.* *Causa adulterii.*

That which a Divorce doth work and bring forth may be seen by that which was sayd before, and by these cases following.

If a man marry with a woman pre-contracted, and hath Issue by her, this issue in law and truth beareth the surname of his Father: But if after they be divorced for the pre-contract there the Issue hath lost his surname, and become a Bastard *Co. 6. fol. 66.* *The effects and fruits thereof.*

If a Lease be made to a man and his wife during the Coverture between them; now if a Divorce be made between them for any cause that doth dissolve the Marriage, in this case the Lease is determined: But if the Divorce be *causa adulterii*, this doth not determine the Lease. *Co. super Litt. 235.*

If land be given to a man and his Wife, and to the Heyres of their two bodies, and after they are divorced, *Causa precontractus*, hereby their estate of Inheritance is turned into a Joynt estate for life. *Co. sup. Litt. 28.*

If

where & what things the wife shall have again after the Divorce, and what acts of the Husband shall binde the wife after the divorce, and where & what not.

If the Husband during the coverture make any Discontinuance of his Wives land, or any wayes charge it by granting of Rents, Commons, &c. out of it, or entring into any Statute, or the like, and after, they be divorced: In this case she shall avoyd all these discontinuances and charges: And to avoyd the alienations, the Writ of *Cui ante Divorcium* is given her, it is to recover the Lands he held in her right alone, or joyntly with him, which he aliened during the Coverture; or she may enter by the Statute of 32 *H.* 8. But such things as are executed, as gifts and sales of her goods, waste, seysage of Wards, receipts of Rents and presentments to Benefices, and the like, that were done during the Coverture, shall stand, and cannot be avoided. *Br. de arraignment:* 18 *Co.* 8. 75.

If Lands be given to her Husband and her in Franck-marriage, with her marriage, and after they be divorced, now the wife shall have all the Land; and if the Husband keep it from her, she may sue him: So if goods were given unto her, with the marriage of her Husband, and after they are divorced, she shall have all the goods that are left, and not (*bona fide*) sold or spent to her self, and may have a *Detinue* for to recover them, or she may sue in the Spirituall Court for them. 19 *Ass. Pl.* 2. *Dier* 131. *old M. B.* 139 6 *H.* 8. 7.

If the Husband during the Coverture release a legacy due to his Wife, and after they are divorced, it is said the Release is not good to bind the wife: But *Quere* of this case, for I think the contrary to be Law. *Totty & Stephens. B. R.* 44 *Eliz.*

If one that is bound to a woman by obligation marry her, and after they be divorced, it seems her action that was suspended, is now revived. Yet see 11 *H.* 7. 4. *Dyer* 140.

If lands be given to the Husband and Wife, so as now they have no Moyeties, yet if they be after divorced, there shall be moyties again between them: And if they be Donees in tayle, and after divorced, now they have but Frank-tenant. *Brow. Tayl.* 9. & *ex Perk. Sect.* 338.

It is a double marriage which by the Common Law was an impediment to a man to demand his Clergy in Felony, or to be called to holy Orders, which is now out of use: See *Stat.* 1 *Edw.* 6. *cap.* 12. 1 *Eliz. cap.* 7. 18 *Ed.* 3. *cap.* 2. *Expert terms of the Law. p.* 38. *Bygamy.*

A *Feme sole* is either a Virgin (*a*) one that was never married, or a widow (*b*) one that hath been married, and her Husband is dead, for then she is as free as she was before by law of God and man. *Rom. cap.* 6. *Feme sole.*

No person must by flattery, fraud, or force, help to convey away any Maid under the age of sixteen yeares that hath any great estate of lands, or goods, out of the custodie, and against the will of their Parents, or such as have the lawfull custodie of them, under payn of imprisonment two years, without Bayl or such Fine as the Star-chamber shall assesse: But Guardens, Masters and Mistresses may take the bodies of their Wards and servants notwithstanding. *Stat.* 4. & 4 *Phli. & Mary, cap.* 8. *Crompt. Jurisd. f.* 30.

And if any person shall deflowr such a Mayden, or contract marriage with her without the agreement of her Parents, or Governours, he shall be imprisoned five years, without Bail, or pay such Fine as the Star-chamber Court will assesse: And if any such Mayden after twelve years of age before 16. shall consent to any such contract against her Parents or Tutors agreement or liking, the next of Kin shall have her land during her life: and if any man shall take away any such woman against her will, and marry her, this is felony. *Idem Stat.* 3 *H.* 7. *cap.* 2. 39 *Eliz. cap.* 9. *Stat.* 11. *H.* 7. 20.

If she have any estate in tayle, or for life made to her by her Husband, or any of his Ancestors, of his or their land, she must not alien it, to barr the Heyr, and if she do, she shall forfeit her estate, and he may presently enter upon her, and put her out. See more in *Discontinuances*; but she may dispose it for her own life. *The restraint of Widows.*

The widows of the Kings Tenants that held in *Capite*, must not enter upon their Dower, or third part without licence or assignment of the Court of Wards. See *Dwar. Stat.* 32 *H.* 8. 46. 17 *Ed.* 2.

The wife of a Copy-holder, that holdeth by Widdowes Eſtate, muſt do ſuit of Court, be ſubject to forfeitures, are to be admitted tenants, and appeare and be ordered at the Court as other Copi-holders. 20. *Iac. Curia principis.*

If her Husband die inteſtate, or the Executors named by his Will, do refuſe; the Adminiſtration of his Goods doth moſt properly belong to her, and the Ordinary ought to grant it to her, or the next of his kinn, or both, at his diſcretion. She ſhall have Dower *Quarentine* and *Paraphanalia*; all which ſee in their ſeverall titles. *Stat.* 21 *H.* 8. *cap.* 5.

The benefit which the Law gives to Widdows.

She may by Will deviſe the crop of Corn growing upon the ground ſhe holdeth in Dower. *Stat.* 20. *H.* 3. *cap.* 2.

If any man take away and marry any Womans maid, or Widdow againſt her will, and the liking of her Parents or tutors, he ſhall be puniſhed as a fellon, and not have the benefit of his Clergy. *Stat.* 3. *H.* 7. 2. & 39. *Eliz.* 9.

Generall Rules touching Acts.

Acts.

1. WHere many joyne in an act, and ſome of them might not lawfully do it, it ſhall be ſaid the Act of him only that might lawfully do it, & not of the reſt. As if a Patron that doth ſuffer an uſurpation by ſix Moneths grant an Annuity to *I. S.* till he do promote him to a Benefice, and after he and the uſurper preſent him to that Benefice, this is the Act of the Uſurper in law, and therefore the Annuity is not determined. So if the Diſſeiſee, and the heire of the Deſſeiſor, that is in by Diſcent, make a Feoffement by one Deed, & give Livery, this ſhall be ſaid the Feoffement of the heir only, and the confirmation of the Diſſeiſee. *Dyer* 192. *Litt.*

2. The Law regardeth Deeds and Acts more then words, and therefore if mens deeds and words be repugnant, the Law will opperate upon the Deeds, and reject the words. As if one make a Deed, and deliver it to the party himſelf as an Eſcrow, till certaine Conditions, this ſhall take effect preſently by the Delivery. *Coo.* 3. 26.

3. The Law doth more favour and delight in ſubſtantiall

Acts, then circumstantiall. As in pleading, if one plead a Fine levyed by a Husband and wife, he need not shew how the wife was examined, nor before whom it was acknowledged, nor such like circumstances *Plow.*10. *Substantiall Acts. Circumstantiall.*

4. The Law doth not require necessary circumstances. As that process should be sent out to command one to appeare in Court, that is alwayes present in Court. 2 *H.*6.1.

5. A man cannot do an Act to himselfe, and be both Agent and patient, unlesse it be a man that hath a double capacity. Therefore a man cannot present himselfe to a Benefice: nor make himselfe an Officer: nor be both Judge and party to be judged: nor being Sheriffe, summon or warne himselfe nor sue himselfe. But a Deane and Chapter in the politique capacity may enfeoffe the same Deane in his naturall capacity: And a man may by way of retainer do an Act to himselfe; As if he disseise one of Land out of which he hath a Rent charge, he may pay himselfe. 13.*H.*8.12.14.*H.*8.31.*Dyer* 188.8.*H.*6:29.*Litt.*147. *Agent & Patient. Politicall. Capacity. Naturall.*

6. A man shall not be suffered to do any thing against his owne Act.

7. Every mans act shall be expounded most strongly against him that doth it. *Plow* 140.

8. When any act is to be done by agreement between parties, and it is not expressed between them, by whom, but it is left doubtfully, it shall be done by him that hath most skill. As if the Condition of an Obligation be, that the Obligee shall bring to the Obligors shop, being a Taylor, three yards of Cloth (which shall be shapen) and the Obligor shall make the Obligee a Gown of it: the Obligor that is the Taylor must shape it. 9.*Ed.*4.4.

9. All personall Acts must be done by the person himselfe, and cannot be done by another. 22.*Ed.*4.34. *Personall acts how to be done.*

10. The Law favoureth all Acts that are done in the right of another. And therefore a man outlawed or excommunicate may sue as Executor. 21.*H.*6.30.

11. The Law hath much regard to the originall of every act, *Et cujusque rei potissima pars est principium.* Therefore it is that a woman Covert, when she hath but the beginning of

a title of Dower by marriage, may barr it by fine, *Coo.* 10. 49.

The act of God.

12. The Act of God shall prejudice no man. *Necessitas non habet legem.*

Acts of the Law.

13. 1. All the Acts of Law are very equall and just. *Æquior est dispositio legis quam hominis.* 2 *H.* 7. 5d *Dyer* 29. *F. N. B.* 34.

2. Acts of Law are of more efficacy then the Acts of the party. *Fortior est dispositio legis quam hominis. Coo.* 8. 76. 185. 6. 40.

3. Acts of Law are more esteemed then Acts of men. And therefore Parceners that come to the Land by Act of Law, were enabled by the common Law to make partition, but not Joyn-tenants or tenements in Common. 49. *Ed.* 3. 15.

Executed } *Executory.*

14. 1. The Law favoureth things executed more then Acts Executory.

2. The execution of all Executory things, hath at all times retrospect to the originall cause, and it all maketh but one act though it be due at severall times. *Causa et origo est materia negotii. Coo.* 1. 99.

15. Acts done between Persons, shall not prejudice a stranger that is not party nor privy to such act.

Res inter alios acta nemini nocere debent. 6. repib. (1) Things among others ought not to prejudice any man, as if a tenant by an *auter* service aliens, the services shall be multiplyed. 6. *rep.* 1. *b.*

No incumbent shall be removed by the *Stat. Westm.* 2. by 2. *Inn.* an assise of. *Darrein* presentment purchased within the six Moneths, unlesse the incumbent be named in the Writ. 6. *rep.* 51.

If a Lessee grant a rent charge to a stranger, and after this surrenders to his lessor, though by the surrender, the terme be extinct, yet this shall not hurt the estranger, but that he shall have his rent. 8. *rep.* 14.

So if *A* having a rent-charge, acknowledges a Recognizance to *B.* and afterwards *A.* releaseth the rent to the fore-tenant, yet *B.* may extend this Rent. 7. *rep. Lillingtons. c.* 39. *a.*

So

So if *A.* enfeoffe *B.* upon condition to be void upon payment of one hundred pound to the heirs of *B. B.* enfeoffe *C.* and dyeth, then tis agreed between *A.* & the heir of *B.* that *A.* shall pay but thirty two pound, but yet that one hundred pound shall be payed, and all that shall be repaid except thirty two pound, whereupon such payment and repayment is made, this is no performance of the condition for the estate of a third person shall not be divested by covenous payments between parties. 5. *Rep.* 96 *a.*

If *A* make a Lease to *B.* saying render rent generally, this rent shall go to *A.* and his heirs, but if he saith render rent to *A.* this shall not go to the heir. *Dyer* 45. *a.*

So if *A.* enfeoffe *B.* with warranty generally, this warrant shall go to the heir of *B.* but if he saith with warrant to *B.* this warrant shall not go to the heir of *B. Dyer* 45. *b* 6. *E.* 2.

17. Compulsory acts are more favoured in Law then voluntary Acts. And therefore if an Administrator pay debts, or discharge funeralls, this shall be good and bind the Executors: In debt for boording, the Defendant may make his Law. But if it be by a Jaylor against a Prisoner, the Prisoner cannot wage his Law, because he is compellable to find the Prisoner. Acts that men are forced by necessity and compulsion to do are not regarded. And therefore if a man be made, his hand be held and forced to kill another, this is no offence. *Plow.* 19. If a man do an Act *per dures*, it is void and shall not bind him. *Idem.* For necessity doth yeild and give place to the Lawes of God and man *Math.* 12. *Exod.* 29. *1 Kings chap.* 21. *Compulsion.*

It is where any Action is brought by, or against an Infant, thereupon motion to the Court or plea, by the Infant in the one case, or other party, or a stranger in some cases, or sometimes by the Court it selfe, *ex officio*, the Suit shall be stayd, untill the full age of the demandant or tenant. *Brook, age in toto. Fincheley* 360. *Coo.* 6. 5. *Age Praier.*

In most cases where the heire is sued for the Land he hath by Discent, or for something out of or concerning that land, wherein he is by Discent, and he be an Infant, there upon prayer made, he shall have his age allowed him: As in *Where age shall be granted to him or them who pray for the nonage of the def. or tenant.*

a Cui

a *Cui in vita*: A writ of Customes and services, a *Cessavit*, when the Infant hath the Tenancy by Descent: A writ of *Det.* brought upon an Especialty, as an obligation, Statute, or for a *Nomine pœnæ*. A Writ of Error if he be tenant: A writ of *Ayell*, if the Action were founded on his own wrong: A Writt of *Formedon in Discender*. *Coo.* 6. 5. 9. 85. 3 *H.*6.46. *Coo. super Litt.* 290. *Fitz. Age. Br. Joyntenancy* 27. *Merton cap.*5.

Where not.

But in such Actions where the Infant is supposed to come to the Land by his own wrong, as if he be a Disseisor. And in such actions as are found upon the Infants own wrong, as in a Cessavit of his own cessing. And in a *per que Servitia*, against an Infant that hath the Tennancy by discent: And in a *Formedon* brought against the heirs of one that had an estate for the life of another granted to him and his heirs, where he is heir by speciall occupancy only: And in a *Nuper obiit*, when he claimeth as heire from the same Ancestor: And in a *Partitione facienda*, where they are both in possession: And in an Attaint: And in a Writt of *Entry sur disseison* to the Ancestor, if it be freshly pursued: And in a *Cui in vita*, or *Sur cui in vita* against the vouched, being heire to the Husband within age. (*b*) And in a Writt of Dower, or an Appeale (*b*) And in a Writt of *Execution* sued against his Lands, upon a Judgement had against his Father: In all these cases, he shall not have his age allowed him, neither shall the suit stay for that cause. *Coo.* 9. 85. *stat.* 3. *Ed* 1. 46. *Dyer* 137. *Coo. super Litt.* 239 *Co.* 6. 4. *Dyer* 321. 9 *H.*6.6.10. *H.*4.5.9. *H.*6.46. *Westm.* 4. 46. (*a*) *Adjudge Eppecas. Tr.* 4. *Jac.* (*b*) *viveas M.* 7. *Jac Coo. B.*

Where age shall be granted, and suit stay for the nonage of the Plaintiff or Demaundant.

In all cases where it may be presumed to be in favour to, and for the benefit of the Infant, least for want of the right and full understanding of his case, and the truth of the matter, he be prejudiced of the right discended to him; though but a bare Right discend. As in all reall Actions Auncestrell of the possession of his Ancestor. And in all cases where a bare right in Fee-simple discendeth from any Ancestor to an Infant (which right was once in opinion) there in any Action Auncestrell brought by the Infant, the tenant without pleading any Plea may pray the suit may stay, as in a Writt of Right, as heir to his

his Anceſtor, and lay the Eſplees to be taken in his Anceſtor: So in a *Formedon* in the Reverter as Heyr to the Donor: So if an Infant alien within age, and his Heyr being an Infant ſue a *Dum fuit infra atatem*: So if the Heyr within age bring a *Non compos mentis*, the Tenant may pray it may ſtay. And in all actions Aunceſtrell poſſeſſory, as Coſenage, Beſayl, Ayle, &c. where the Anceſtor dyes ſeiſed, the Tenant cannot without pleading pray the Suit may ſtay. And in *Waſte*, or *Quod ei deforceat* [illegible] *ris clamat* brought by an Infant, the Tenant plead a [illegible] *ſuus Impeachment del waſt*, and offer to attorn ſaving his priviledg, and pray the Suit may ſtay, it ſhall ſtay. *Co.* 6. 3. 9. 85. & *ſuper Litt.* 164. *Glouc. cap.* 2.

In all caſes where it cannot be preſumed to be for the bene- *Where not.*
fit of the Heyr within age, to have the ſuit to ſtay: As where the Anceſtor dyed ſeiſed, and the land deſcended to the Infant, and he hath entred and took the profits, here the ſuit ſhall not ſtay. And therefore in all reall actions poſſeſſory, generally the ſuit ſhall not ſtay for the nonage of the Plaintiff or Demandant, as in a Writ of *Entry ſur diſſeiſon*, of a Diſſeiſon made to the Infant himſelf: In a writ of Right upon a Deforcement to the Infant himſelf of the land he had by Diſcent: in *Eſcheat*: *Ceſſavit*: *Droit ſur Diſclaimer*: *Moſne*: *in Formedon in Deſcender*, unleſſe ſomething be pleaded againſt him, to which he cannot be party to try it within age: In a Writ of *Entry ſur Diſſeiſon* to the Anceſtor, if freſh ſuit be made to the Anceſtor, and after the Writ brought, the Anceſtor dyed before tryall could be had. *See Infant. Co.* 6. 3. 9. 85. *Weſtm.* 1. 46.

A man hath by law for ſeveral purpoſes divers ages aſſigned *Diverſity of ages.*
to him, *viz.* 12 years, at which age he may take the oath of Allegiance in the Torn or Leet: 14 years, at which age he may conſent to marriage then, or agree to a marriage before: At which age alſo he being an Heyre in Socage, may chooſe his Guardian, and at this age he is counted to be of diſcretion: 15 years, at which age the Lord ſhall have ayd, to make his Son Knight: under 21 to be in Ward to the Lord by Knights ſervice: under 14 to be in ward to Guardian in Socage: at 14 to be out of ward of the Guardian in Socage, and then he may chooſe his Guardian: At 21 to be out of ward of Guardian

in

in Chivalry. So also hath a woman divers ages assigned to her, *viz.* 7 years, at which age the Lord her Father shall have ayd of his Tenants to marry his daughter: Nine years, at which age a woman may deserve and have Dower: Twelve years, at which age she may consent to a Marriage then, or agree to a Marriage before: Untill 14 to be in ward, and then to be out of ward: 14 years, at which age, if she attained thereunto in the life of her Ancestor, she shall be out of ward: 16 yeares, under her marriage, if she were under the age of 14. at the death of her Ancestor: And at, and after 16 years, she is past the Lords tender of a Husband. At seven yeares of age, not before, she may promise marriage to a Husband. *See the womans Lawyer. f.* 52. *Coo super Litt.* 78. 34 *Ed.* 1. *Stat.* 3. *Dyer* 162. 313. *Coo.* 7. 43. 6. 67. *Litt.* 204. 3 *H.* 7. 1. 21 *H.* 7. 31. *Litt. sect.* 259. 35 *H.* 6. 40.

Also there be divers ages assigned to men and women both: As for the committing of Felony, any age of Discretion which is in some sooner, in some longer, and of this the Judge shall enquire and judge: 17 years, at which age they may take upon them an Executorship, or be an Administrator: 18 yeares, at which age they may make a Testament, and make Executors for Goods and Chattels: 21. which is the full age of male and female, and then, & not till then they may make all manner of Contracts, alienate their Lands and Goods, and in some places by speciall customs sooner: *See Custome. Coo. super Lit.* 171. *Doct. & Stu. f.* 113.

Two Justices of the Peace in the County, or the head Officer and two Burgesses in Cities, *&c.* may appoint any woman of the age of twelve years, and under forty, being unmarried, and out of service, to serve and be retained by year, weeke, or day in such sort, and for such wages as they shall think meet, and if she refuse, they may commit her to prison till she shall be bound to serve. *Stat.* 5. *Eliz. cap.* 4.

Counter-plea of age. It is when one bringeth an action, and the Tenant or Defendant either for his nonage, or the nonage of the Plaintiff or Demandant prayeth that the suit may stay, and thereupon the other replyeth, and sheweth cause why it should not stay, this reply is called a Counter-plea of the age. *Terms, ley. Counter-plea.*

Regularly

Regularly one and the ſame perſon cannot be Agent and Patient in the ſame Act unleſſe it be in a divers capacity, or in caſe of neceſſity: And ſo one of the Chapter may infeoff the Dean and Chapter, and he ſhall take with the reſt by his own livery. The Wife of a Tenant in Socage may endow her ſelfe, an Executor pay himſelf, and a Diſſeiſor retain a Rent due to him out of the Land. But unleſſe it be in ſuch caſes this rule holdeth. (*a*) And therefore it is, that a man cannot be Judg in his own cauſe: The Cenſors cannot be Judges to give ſentence. Miniſters to make ſummons, and parties to have the halfe of the Forfeiture: And hence it is, If a man have Conuſans of all manner of Pleas before him within his Mannor of *Dale*, that he ſhall not hold plea in a matter wherein himſelf is party. *Quia iniquum eſt aliquem ſui rei eſſe judicem. Vide Accord: Attornment, Acceptance, Relation, Teſtament, Baron & Feme, Contract. Coo.* 1.137.8.118.13. *H.*8.15. (*a*) *Coo.*8.118. *Agent, & Patient.*

Agreement is the coupling or knitting together of two or more minds in any thing already done, or to be done. And Diſagreement is the contrary to this when their minds are not united. *Plow. 6. Terms ley.* *Agreement.*

Agreement or Diſagreement is diverſly diſtinguiſhed. For it is either reall, (*i*) that which doth concern lands: Or perſonall (*i*) that which doth concern other matters: And theſe are alſo either *Generall* or *Speciall*: And both theſe are alſo *Expreſſe*, or *Implyed*: Alſo *Verball* or *Actuall*: And alſo *Executed*, or *Executory*. That which is *Executed*, is either *precedent*, as when goods are ſold for money, and the money is payd: Or when the Husband doth agree his Wife ſhall make a Will, and ſhe doth ſo, or elſe it is *ſubſequent*. As when one doth diſſeiſe another to my uſe, and after I agree to it: Or the Executor doth aſſent to a Legacy given, or the Leſſee agree to the grant of the Reverſion. That which Is *Executory*, is alſo either grounded on certainty, as when the agreement is to pay ten pounds for ten buſhels of Barley at *Michaelmas*: Or elſe it is grounded on uncertainty, as where I do agree with another at a price for all his wood, if I like it when I ſee it. *Plow. 6. Perk.*45. *Coo.*3.26. *Stat.*25. *Ed.*3. *cap.*3.44 *Ed.*3.37. 18 *Ed.* 4.15. *Stat.*26. *H.*8.3.14 *H.*8.24. *Aſſent, & Diſagreement.*

The efficacy & operation of agreement and disagreement.

Agreements of the parties in many cases will change the course of the Law, as the rule is, *Modus & conventio vincunt legem*; as though a Lessee for life or yeares be to have House-boot, *&c.* and be not to cut tymber by Law, yet by agreement he may be abridged of the one, or granted the other: Also this will help faults and errours in processe and proceedings of Law, *juxta illud, Consensus tollit errorem.* Also disagreement will make a nullity of a thing that before had essence; as if a Deed be made to a Feme Covert, and the Husband do after disagree to it. *Coo.* 4. 62. 64. 5. 36. 40. *Coo.* 5. 119.

What act shall be said to be a good agreement for the benefit or prejudice of them which agree.

If one promise to my Wife, that if I release *I.S.* out of Execution, who is at my Suit; that if *I.S.* do not pay me the mony by such a day, he will; and when I heare of it, I doe enlarge him, this is an actuall or implyed agreement, on which I may ground an Action. 27 *H.* 8. 24.

If one devise a Tearm to *A.* for life, the Remainder to *B.* for all the Tearm, and make *A.* his Executor and dye: And after *A.* the Executor comes to *B.* and intreats him to release all his interest in the Term to *A.* and he doth so, and *A.* doth accept it; This is an actuall assent to the Devise. *Coo.* 10. 52.

If an Estate were made in Fee-simple or tayle to a man and his Wife, and he dye (*i*) and he have not disagreed to it, now this is an agreement in Law, and vesteth the estate in her, and if she after his death enter into the Land, and take the profits, this is an actuall agreement, and good to bind her, though she say never a word, or do it never so secretly. *Coo.* 3. 26. *Coo.* 4. 4.

If there be Lord and Tenant, and the Tenant enfeoff the Lord and a Stranger, and give livery to the stranger in the name of both, and after the Lord doth enter and take the profits, this is a good agreement in the Lord. *Coo.* 3. 26. 10 *Ed.* 4. 12.

If Lands be given to the Husband and Wife in tayle, and after the Statute of 32 *H.* 8: the Husband alien the Land to the use of him and his Heyrs, and after devise it to his Wife for life, and dye, and after his life she doth enter, clayming only the estate for life, this is a good agrement to barr her of taking or claiming any other estate: But if the agreement had been

been by word only, it had been nothing worth: *Coo.* 3. 26. *Dyer* 351.

An agreement as an Attornment or the like may be good in the abſence of the party for whom it is. *Coo.* 2. 69.

If the Husband and Wife ſell the Land of the Wife for money by word, and after they two levye a Fine to the Vendee and his Heyrs, this will bind the Wife without any writing to prove her aſſent or agreement. *Coo.* 2. 57.

If an Infant a parcener that hath made diviſion, do after at his full age take the profits of the part allotted to him; this is a good agreement affirming the diviſion, but the taking of the profits of a moyety doth not ſo. *Coo. ſuper Litt. fol.* 171:

If an Infant under the age of conſent for Marriage endow his Wife *ad oſtium Eccleſiæ* without deed, and after when he is of age of conſent agree to it, yet this agreement will not make the Endowment good. *Perk.* 438. *What not.*

If an Eſtate be made in Fee-ſimple, or Fee-tayle to a man and his Wife, and the Husband dye, and the Wife before her Entry ſay ſhe doth agree to her Eſtate, or uſe the like words, yet this will not bind her where ſhee doth demand Dower in a Court of Record, but that ſhe may there wave it. *Coo.* 3. 26.

If an Obligation be made to my uſe, and being tendred to me, I refuſe it, and after again I agree to it, and will accept it: now this agreement after will not make the obligation that was voyd by my refuſall good again. *Coo.* 5. 119.

If a deviſe be made of any goods or Chattels, the agreement of the Executor is neceſſary, and the Legatee cannot take the thing deviſed without the aſſent of the Executor, but he will be a treſpaſſer in ſo doing to the Executor. *Vide Teſtament. Coo.* 10 47. *Plow.* 540. *When the agreement of any perſon is requiſite for the perfection of any thing done.*

If a Reverſion be granted of an eſtate for life or years, or a Rent in being; in moſt caſes it is needfull the tenant for life or years, or the terr-tenant do agree, elſe the grant is not good. *Vide Attornment. Plow.* 25.

If *I. S.* diſſeiſe another to my uſe, I am no Diſſeiſor, nor have any free-hold till I agree to the Diſſeiſon, but he is the tenant till then: And after I have agreed to it, I am the Te-

nant and ſeiſed of the freehold 12. *Ed.* 4 9. *Perk.* 47.

If a tenant in tayle make an exchange and dye; and the Land taken in exchange, diſcend to his iſſue, in this caſe the agreement of the Iſſue is requiſite, for the exchange is not good till then. 14 *H.* 6. 2.

If a Feme Covert make a Teſtament, the Husband muſt agree to it, elſe it is not good *Coo.* 4. 51.

If a Feme Covert be an Executrix, ſhe cannot releaſe any Debt or duty to the Teſtator without the aſſent of the Husband. *Coo.* 5. 27.

If any eſtate in poſſeſſion or Remainder, or Reverſion by deviſe, or act executed for life, in Fee, or otherwiſe be made to me, I muſt agree to it, untill it be in me, for I may refuſe it. *Dect. & ſtu.* 119 *b.*

Where not. If a Releaſe, obligation, or Deed be made to me, and delivered to another to my uſe, here there is no need of any agreement to make the Deed good or veſt the things in me: But if I diſagree to it, by this I make the Deed void. *Coo.* 3. 26. *Dyer* 167. *Br.* 5 *Coo.* 5. 119.

If an Eſtate be made to a woman Covert, there needs no agreement of the Husband to veſt the Eſtate in him. 3 *H.* 7. 9.

If a woman hunt a Right or title of entrie into any land, and ſhee take a Husband, and he enter, here needs no agreement of the wife to veſt the Free-hold in her: So if an Infant have a right or title of Entry, and a ſtranger enter to his uſe, the Eſtate is in him without agreement: *Perk.* 46. 47.

If the Husband and wife levye a Fine of the Land of the wife, and the Husband alone declare the uſe, this will bind the wife, and her agreement to the limitation of the uſes is not needfull. *Coo. Perk.* 2 57.

What act ſhall be ſaid to be a diſagreement for the benefit or prejudice of him which diſagreeth. If a Feoffement be made to a woman Covert, her Husband being beyond the Sea and when he returne being not content with the Feoffement, he will not ſuffer his wife to take the profits, nor to continue the Seiſon, but doth himſelfe, and alſo cauſeth her to relinquiſh the occupation; now hereby he ſhall be diſcharged of damages, for the time after his relinquiſhment if the Feoffor were a Diſſeiſor. *Perk.* 14.

If

If there be Lord and tenant, and the tenant by Deed infeoffe the Lord and a ſtranger; and give livety to the ſtranger in the name of both, and after the Lord enter; and diſtrain for the Seigniory; this act doth amount to a diſagreement of the Feoffment and doth deveſt the Franck tenant out of the Lord. *Co.* 3.26.12. *Ed.* 4.12.

If Lands be given to the Husband and wife in tayle; and after the *Stat. of* 32. *H.* 8. the Husband Alien to the uſe of him and his heirs; and then deviſe the Land to his wife for life. And after his death ſhe enter clayming for life only; this is a Diſagreement to the Eſtate tayle *Co.* 3.26. *Dyer* 351.

If a woman Covert have a Joynture made to her after marriage, and after her Husbands death, ſhe brings a Writ of Dower for her thirds; This is a diſagreement to the Joynture. *Co* 4.5.

If an Infant marry *Infra annos Nubiles*, and after before any agreement when he is of age of conſent, he marry another; this is a good Diſagreement, without any words of Diſagreement at all. And it ſeems that Diſagreement, though it be not before the Ordinary is good, and they may not marry elſewhere, but the Ordinary may puniſh it. *Robinſons caſe. Curia 7. Jac. Broo. gard.* 124. *Co. ſuper Litt. f.* 79. *a. b.*

If one deviſe Land to his heir in tayle, the Remainder over to a ſtranger, and the heir enter and diſagree to the deviſe, and ſay he will have it in Fee, yet he ſhall have but an Eſtate tayle only. *Plow.* 545. *Perk.* 569. *What not.*

If one agree to give me twenty pounds for a parcell of wood, if he like it when he ſee it, and when he ſee it he do like it; now he cannot afterwards diſagree to it, to make void the contract againe. 18. *Ed.* 4. 15.

If tenant in *Precipe* agree not in the Countrey, this is not ſufficient to barr the free-hold. 12. *H.* 4.21. *Br. ſurrender* 28. 11. *H.* 4.62.6. *Aſſ. p.* 2. *Krll.* 116. *b.* 8 *rep.* 61.6. *Encounter* 27. *Aſſ. p.* 37. *Br. ſurrender* 28.6. *Aſſ. p.* 2.

If Lands be given to a Husband and wife in tayle, or in Fee, and the Husband dyeth, and the wife doth afterwards diſagree to the eſtate by words in the Countrey, and ſaith ſhe will not have it, or the like, this verball wayver in the Country,

try, will not deveſt the Franck tenement out of her, but ſhe may enter when ſhe will after, notwithſtanding, unleſſe it be in caſe where ſhe will demand Dower of by the Statute. 27. *H.8. cap.* 10. *Coo.* 3.26.

If an Eſtate were made to a man and his wife and he dye, and the Lord ſuppoſing the Husband to dye ſole ſeiſed, aſſigne the Wife her dower by word; which ſhe accepted, yet ſhe hath the free-hold of the whole in her, and this agreement ſhall not prejudice her. *Coo.* 3.26.

If a Feoffement were made to four, and livery is made to three, in the name of the reſt, and the fourth when he ſeeth the Deed ſaith, that he will not agree to it, nor have any thing in the Land: yet this diſagreement will not deveſt the free-hold, for his diſagreement muſt be in a Court of Record. So if a Feoffment be made to the Lord and a ſtranger by the tenant, and the Lord by word diſagree to it: this is no diſagreement to deveſt the eſtate. *Coo.* 3.26. 10. *Ed.* 4.12.

Where and in what caſe the diſagreement of any perſon is neceſſary for the deveſting of any intereſt, or property.

If an Obligation be made to me, and deliverd to my uſe, now if I will avoyd it, I muſt diſagree to it when I heare of it. So if a Deed of gift be made to me of Goods; if I will avoyd it I muſt diſagree to it, and by this the property will be deveſted: So if any Eſtate or an Obligation be made to a Feme Covert, if her Husband will avoyd it, he muſt diſagree to it, for it is in him till diſagreement: So if any Eſtate be made to the Huſband and wife during the Coverture, and ſhe would avoid it after his death; ſhe muſt diſagree to it, then, for till then it ſhall be in her: if an Infant be marryed *infra annos nubiles*, and he would avoyd it after, it muſt be by Diſagreement. *Coo.* 3.26. 27. *Dyer.* 167. *Dyer* 49. *Perk* 43. *Coo.* 5.119. 3 *H.* 6. 39. *Bro.* 6. *Coo* 6.22. *Perk* 438.

If the Husband and wife levy a Fine of the Land of the wife, and the Husband alone declare the uſes, if the wife will avoyd this or alter the limitation, ſhe muſt diſagree to that Declaration, and make her Diſagreement to appear. *Coo* 2.57.

Where and in what caſe after agreement one may diſagree, where otherwiſe.

Regularly where a man hath once diſagreed to the party himſelf unto whom the agreement or Diſagreement is to be made; he can never after agree. But if perſons marryed within age of conſent do afterwards before that age, by word or writing

writing under their hands or before their Parents disagree or marry others; yet after their years of consent, they may agree againe, and make the marriage good. But after disagreement at age of consent, no new agreement without a new marriage shall make it good. *27. H. 8. Robinsons case Curia p. 7. Jac. Coo. B. Coo. super Litt f. 79.*

This is applyed to a speciall kind of agreement, made either between Coparceners (which may be made without writing) as to present to a Benefice by Turn, or the like: But it cannot be between tenants in Common without writing, for in a *Q. Impedit*, the Composition must be shewed, but if once every one have had his turn according to the composition, then after the composition need not be shewed. Or it may be heretofore between the Parson, and one of his Parish, to be discharged of paying Tythes for something agreed on, or between the Parson and Vicar called sometimes an Indowment. *Dyer* 29. 194. *Coo.* 2. 38. 44. 46. 47. *Coo* 6. 6. *Composition.*

In the composition between the Parson and Vicar, usage is much regarded, for though the Composition be, that the Vicar should have Garba, yet if he have never had but Hay, he shall have no more now. *Smiths case adjudge.* *How it shall be taken.*

If the Composition be, that the Parson shall have all the Tyth-corne, and the Vicar all other Tythes; and one sow his arrable Land with Saffron, the Vicar shall have it. *Vicar de Farnhams case Tr. I. Jac. Coo. B.*

It is commonly held, That if the Vicar be to have the Tythes of all the Crofts in such a place, that yet he shall not have the Tythes of the Crofts, parcell of the Parsonage, and if he be to have the Tythes of all the Dove-houses of the place, yet he shall not have the Tithes of the Dove-houses belonging to the Parsonage.

If the Vicar by the endowment, be to have the Tith Hay of all the Meadows in such a place, yet he shall not hereby have any more but the Tithes of those that were Meadows at the time of the indowment, and not of those grounds that were made Meadow since the endowment.

By

By Baron *Draham* a difference was taken, where an Endowment is locall, as where the Vicar doth claym to have all the Tythes in such grounds, or in such a Dower, and he hath always had the Tythe of that place, and it hath never been sowed, and he have no tythes but the small tythes of the rest of the Parish by the Endowment; yet if it be new sowed, he shall have the tythe of the Corn: But if he be to have the smal Tythes generally, and hee hath always had Tythes in such a place, and it was never sowed, and now it is sowed to Corn, in this case he shall not have the Corn. 8 *Car. & Sarum Assises.*

Arbitrment. It is an *Award*, *Determination*, or *Judgement* which one or more doth make at the request or agreement of two or more, for and upon some Debt, Trespasse, or Controversie between them; for the ending and deciding of which, the parties have chosen and authorized them as Judg or Judges. It is a Judgement given by such as are elected by the parties unto the controversie, for the ending and pacifying of the sayd controversie according to the *Compromise* and *Submission*, and agreeable to reason and conscience. And therefore they are called *Arbitrators*, Judges indifferently chosen by the parties that have power to give a definitive sentence in the matters of difference, and this *Award* or *Sentence* is called a *Judgment*.

Arbitrators.

The difference and agreement between arbitrement and an accord.

This doth differ from an *Accord* herein only, that this is made by the parties themselves, and that by the mediation of Friends.

2 This is no plea to an Action upon the things accorded, if the thing awarded be not done, for there be meanes to compell the doing of it; but that is a good plea to any action brought upon any thing put in *Arbitrement*, though the thing awarded be not done; if there be means to compell him to it, that was awarded to do it. 19 *H.* 6. 37. *Plow.* 11. *Kelw.* 121 *Dyer* 73.

An *Umpire* is the same in effect with an *Arbitrator*: *Index honorarius, non a lege datus sed ab ijs qui litigant electus qui totius rei habet potestatem ad arbitrandum non ex lege & stricto jure, sed prout ipse æquum esse existimet.* And he is by the parties to order the matter, if the Arbitrators cannot agree, or do not make the *Award* by the time sett.

A Sub-

A Submission or Compromise, *Compromissum est simultanea illa partium promissio, qua sua sponte ad alicujus boni viri arbitrium suam remittunt controversiam*: And this is sometimes in writing (which also may be made by the parties reciprocally, or to the Arbitrator) as by Obligation, Recognizance, Covenant, *&c.* or by word only, and both these are sometimes absolute, and sometimes conditionall, as if the award be made by a day, *&c.* and sometimes generall of all matters, and sometimes particular of some one or more matters. And this is also expres, or implyed: For in an *Obligation* or *Assumpsit* to abide an *Award* is an implyed submission, & upon a bare submission, an Action may be brought if the *Award* be not performed, if it be to pay money, *&c.* *Coo.* 10. 131. 5. 78. 20 *H.* 6. 18. *Brown & Dennigers case. Trin.* 18. *Jac. Ciprian Salters case*, p. 9. *Submission or Compromise, what.*

The fruit and effect of an *Arbitrement* is this; that if it be a good and binding *Arbitrement*, and any thing be given or awarded for any wrong done in recompence, and it be either payd or performed: Or if it be such a thing for which the party to whom it is awarded hath means to come by it, or some thing in amends for not performance of it, as where there is an *Obligation* or *Assumpsit* to peform it, it is an Extinguishment of the wrong and controversie thereabout; so that the causes of Suit before, *transiunt in rem judicatam*, insomuch that if the party sue again for any of those matters whereupon the *Award* hath been made; that *Award* being pleaded to it, will be a barr to him in his Suit; As if he say, that they submitted to the *Award* of *I. S.* for that matter alone, or that with others, and that *I. S.* awarded him to pay so much money such a day, and that the day of payment is not yet come; (for an *Arbitrement* that one of the parties shall pay money, doth give an action for the money): Or if it be past, then that he payd, or at least tendred the money at the day (for so he must say): But if the party pay not the money, then is the other party restored to his first action; yet so as, it is at his election, to have a writ of *Detinue* upon the *Award*, or to sue upon the first causes; but if payment be made, the first wrong is altogether determined by the *Award*: And if the *Submission* be by *The fruit and effect of Arbitrement.*

Obligation, and the *Award* be that one ſhall pay the other money, the party may have an action upon the *Obligation*, or upon the *Award* at his choyſe. 21 *Ed.* 4. 41. 33 *H.* 6. But if there were a *Submiſſion*, and no *Award*, or an *Award* that is not good in Law, which is all one with no *Award*, or there be only a bare *Submiſſion* without Bond or *Aſſumpſit*, and the *Award* be to do ſuch a thing as for which the party to whom it ſhould be done hath no remedy, being a collaterall thing as to make a feoffment, *&c.* or any thing elſe but payment of money; In theſe caſes the party ſhall not be barred in any Suit upon the matters put into compremiſe, neither will any action lye for the not performance of ſuch an *Award*. *Ex nulla ſubmiſſione non oritur actio:* But if the *Submiſſion* be by *Obligation*, or an *Aſſumpſit*, and a Collaterall act be awarded to be done, and it be not done, the Obligation is forfeit, or the money promiſed to be paid by the *Aſſumpſit*, if it were not performed, may be recovered. 6 *H.* 7. 1. 11. *Plow.* 6. 49 *Ed.* 3. 3. 20 *H.* 6. 41. 9 *Ed.* 4. 51. 6 *H.* 7. 11. 8 *H.* 6. 25. *Dyer* 75. *Co.* 5. 78 5 *Ed.* 4. 7. 16 *Ed.* 4. 9. 9 *Ed.* 4. 51. 20 *H.* 6 12. 40. 5 *Ed.* 4. 7, 8 *H.* 6. 25. 16 *Ed.* 4. 8. 49 *Ed.* 3. 3. 33 *H.* 6. 2. 4 *H.* 6. 1. 21 *H.* 7. 28. 9 *Ed* 4. 44. *Plow.* 6. 5 *Ed.* 4 47. 19 *H.* 6. 38. 19 *H.* 6. 38. 20 *H.* 6. 9. 5 *Ed.* 4. 7. 9 *Ed.* 4. 44. *Co.* 5. *Sammes caſe.*

An action lyeth for non-performance of every award upon meer Submiſſion, although it be to perform a collaterall act as to make a releaſe, and ſhall declare upon a mutuall promiſe to perform the award. 20 *H.* 6. 20. *A.* 10 *Rep.* 131. *A. Trin.* 18 *Jac. Be B: le Roy: Brown & Doning.*

An Arbitrement can give no title concerning free-hold, nor bind a right.

The award of a perſonal chattel, as if an award be that *I: S.* one of the parties ſhal have a houſe in queſtion between them, doth alter the property, & give it to *I: S:* ſo that *I. S:* may have an action of *Detinue* for it: And ſo alſo it ſeems it doth of a Chattel reall: But in reall matters which concern Free-hold, an *Arbitrement* can neither give a Title nor bind a Right. *Dyer* 183. 21 *H:* 7. 29. 14 *H:* 4. 19.

But if the *Award* that is made be faulty in any of the particulars following, or there be never any *Award* made, then for not performing ſuch a part of the *Award* as is not good, no Action will lye upon the *Obligation* or *Aſſumpſit* to perform it, neither

neither doth the *Award* in that case where it is defective produce any effect, for no action will lye upon it. *Co:* 10. 132. *Hayns* versus *Henywood*, *M.* 4. *Jac.*

The Husband may submit himself to an *Award* for himselfe and his Wife for the goods and chattels she hath in the right, and by reason of his Wife, and this will bind the Wife. It seems also that an Infant may submit to any *Award*, and it will bind him as well as if he were of full age. 21 *H:* 7: 29. 13 *H:* 4. 12. 10 *H:* 6 14.

What persons may submit to an award, and what shall be said to be good Submission in Law, and what not.

If divers have done a wrong to one, and one of these and he to whom that wrong is done may submit to the *Award*, and if an *Award* be made, the others that were no parties to the *Submission*, may take advantage of it to extinguish the wrong. 7 H: 4. 31. 20 H: 6. 12.

A submission to an *Award* by a Deputy, as if the one party himself, and a Deputy for, and in the name of the other submit to an *Award*, this is a good *Submission*, and the *Award* that shall be made upon it will be good. *Dyer* 270.

If divers be parties to the *Submission*, and one submit at one time, and another at another time, it seems this is not a good Submission, but they must submit all at one time. 4 *Inst. Brid.*

If the Submission be of all actions, causes of action are not conteyned within this. *Co: super Litt.* 285.

But if the Submission be of one thing, within it may be included any thing incident to that thing, & of it an *Arbitrement* may be made within this Submission. 8 *H:* 6. 18, 19. *Co:* 4. 105 *H:* 7. 22.

How a Submission shall be expounded.

If the Submission be by obligation with condition to perform the *Award*, so as it be deliver'd *utrique earum* before a day: now by this it must be delivered to each of the parties, else it is not sufficient. *Br: Condition.* 46.

Though a Submission be by word or writing, and be naked, or cloathed and joyned with an undertaking by *Obligation* or *Assumpsit*, yet before the *Award* be made, it may be countermanded, and the Arbitrators discharged of the work, but with these differences.

Countermand of a submission where it may be, and where it shall be good, and where not.

1 That where there is a naked Submission by word, that may be revoked by word; But if it be in writing, the Countermand

mand must be by writing, for it must be *eodem modo*, as the Submission is.

2 If the Submission be naked, and either of the parties countermand it, and discharge the Arbitrators, the other hath no remedie against him: But if he undertake by *Especialty*, or *Assumpsit* to abide the *Award* of *I. S.* and doe countermand, and revoke it; though the Revocation be good, yet he is subject to suit on the Especialty or promise, for he hath broken his promise.

3 In both and all these cases where the party will have his Submission revoked, he must give notice of his mind therein to the Arbitrators. But if there be two or more of the one side that do submit to the *Award*, one of them cannot revoke the Submission without the rest, especially if it be by Deed *Coo.* 8. 81. *Fitz. Arbitr.* 21. *Cro.* 3. 78. 21 H. 6. 30. 5 *Ed.* 4. 3. 8 *Ed.* 4. 10. 8 *Ed.* 4. 12. 10. 28 H. 6. 6. 21 H. 6. 30.

The duty of Arbitrators, and how they ought to demean themselves.

When the parties have submitted themselves, the Arbitrators may either refuse to meddle with it, or accept the burthen of it: And if they will accept it, the parties are to notifie their controversies to them, or else they are not to take any notice of it (but they cannot enjoyn any oath to Witnesses, & yet may take any evidence that any man will voluntarily by oath confirm) after they have understood the cause, & heard the parties and matters fully, they must make their award *secundum allegata & probata*, and they must doe this themselves, for they cannot transfer their power to another, or make Deputies, (for an *Award* so made will not be good) because they are Judges of the matter by consent. After they have made the *Award*, if by the Submission it be provided for, that it shall be published or notified, then it must be done, and so done as the Submission is, as if the condition be, that it shall be by writing them so: if to all the parties, then so it must be, and till then it is no good *Award*. But if it be left to the discretion of the Arbitrators, and no order be taken by the Submission for the publication of it, the Arbitrators are not bound (but in honestie) to notifie it, and the parties are bound to take notice of it; but if one be to doe a thing that depends upon another thing first to be done by the other party, he must

must have notice of this. 8 *Ed.*4.10.47. *Ed.*3.21. *Co.*5. *Sawens case.*8.98.8 *Ed.*4:11. 8 *Ed* 4.21.1 *H.*7.5. *Plow.*218. *Co.*4.82: 5.103.8.82.8 *Ed*:4. 21 20 *Ed.*4 8.

If the submission be, that the Award shall be delivered to the party, *&c.* before a day if he desire it, if he desire it not, he must take notice of it at his peril. 8 *Ed.* 41 8 21.

If divers of the one side and divers of the other, submit themselves to the Award of divers, the Arbitrators may make an Award for matters between them joyntly, and for matters between them severally: And they may make an Award between some of the one part and some of the other, and not meddle with the rest, unlesse the submission be so, as they must meddle with all or none: For an Arbitrator may protest against medling with some parcell, and make an Award of the rest, if the submission will warrant it, and an Award made of that parcell which is within the submission, is good. 2 *R* 3 18 21 *H* 7 29 *Plow.* 289 22 *Ed.* 422 19 *H.* 6 6.

What matters are Arbitrable and what not.

The most proper matters for Arbitrements, are personall wrongs, and uncertaine duties, as Trespasses, and the like: But most things may be referred to Arbitrement, as differences about Land, and Estates therein: Chattells reall or personall, choses in Action; Reckonings, Accompts, and the like. *Dyer* 183 *Co* 5 78.

But Arbitrators cannot dispose of Land by their Judgement (As the Chancery and a Judgement at the Common law can do) yet they may award, that one party shall enjoy it, and the other not disturb him: Or that the one shall give the other a Bond for quiet enjoying, or the like. And if there be any Especialty or Assumpsit to performe the Award, and he do not; he may sue upon it: Freehold is not arbitrable, 9 *H.* 6 60 *B Kel.* 99 *b* 21 *Ed.* 3 26 14 *H* 4 18 19 24 *Br: abridgement* 5 30 8 *rep.* 137 *a* 3 *Ed* 3 *waste* 5 *contrary to Dyer* 242 *b* 14 *H* 4 19 *a ptr Skyn* 8 *Ri.* 2 *Annuity* 55 12 *disp* 25 12 *Ed* 3 *p.* 24. And for chattells they may dispose them, and give the property or interest to one or another as they please.

1. Debts due for expence about businesse are Arbitrable. 2. So also it seems is a Debt on a contract or damage certaine, being

ing joyned with treſpaſſe, or other things uncertaine: And all theſe are arbitrable before any ſuit begin or after: A debt on a contract alone ſeems alſo to be arbitrable: *See Coo.8 Baſpolis caſe f.97.(1) Adjudge Sumar verſus Bradford 37 Eliz. Coo: B (2) Finches ley 181.*

And therefore if a man demand five pound for divers buſineſſes that he hath done for another, this is a matter Arbitrable Adjudge *Trin.37.Eliz.B.R inter Sower & Bradfield.*

Some books ſay in ſome of theſe caſes, the ſubmiſſion muſt be in writing or elſe the matters are not Arbitrable Quere how and what is meant by that.

But Debts certaine due by Bond, or Bill, or Covenant, or on a ſimple Contract alone which is certaine, are not Arbitrable. Nor Debts upon Arrearages of Account before Auditors. Nor things that are not in *Rerum natura* at the time of the ſubmiſſion, though they after happen. Nor Freeholds, Annuities, Waſt, Deteynment of Charters or the like, yet ſo as before on Penalies or Aſſumpſits to performe ſuch Awards they be bound, or elſe muſt pay the mone y.45.*Ed.* 3.16.*Dyer* 51.6.*H.*4 6.4.*H.* 6.17.10.*H.*7.4.9.*H.*6. 60. 14. *H.*4.18.*Coo.*5 *Samons Caſe.*

But matters of Common wealth, or of marriage, it ſeems are not Arbitrable at all. *Weſt Symb.f.*146.

Incidents to an Arbitrement.

In every Arbitrement theſe five things are requiſite as incidents. *Dyer* 217.19.*Ed.*4.1.*Coo.*10.137.10.*H.*7.4.

1. *Matter* of controverſie, and that muſt be Arbitrable.
2. A good ſubmiſſion of the parties to the Award.
3. Parties to the ſubmiſſion.
4. Arbitrators.
5. An Award, and if either of theſe be wanting it can be no good Award.

Where and in what caſes Arbitrements ſhall be void, and for what cauſes.

Obſerve therefore for the defects and faults of Arbitrements whereby they looſe their force and become void, ſome of them are in ſomething going before the Award it ſelfe; and ſome of them in the Award it ſelfe; And ſome of them, in ſomething comming after the Award it ſelfe, or *ex poſt facto*. Before. As where either the perſons are not able to ſubmit, as Feme Coverts or the like, or have not ſubmitted, as when the Award concerneth ſtrangers, not privaties nor parties, or the things referred, are not things that lye in Arbitrement, and there is no collatterall ſecurity to bind the parties to performe it,

it, or the ſubmiſſion be not legall, or being legall, it is determined by revocation before the Award made. *Coo.* 4. 1. *Kelw.* 99. *Coo.* 5. 78. 8. 98. 10. 131. 17. *Ed.* 4. 5. 12. *H.* 7. 5. 19. *H.* 6. 36. 13. *H.* 4. 12. 8. *Ed.* 4. 10. 20. *Ed.* 4. 8.

The common faults of Arbitrements.

In the Award it ſelfe, as when either the Arbitrators purſue not the Authority given, by the ſubmiſſion: Or they Award ſomewhat to be done to, or by a ſtranger: or the Award is incertaine, or there is an apparent wrong, and they give no ſhew of ſatisfaction: or the Award is made all for one ſide, and nothing for the other, and it imply ſome wrong to him done alſo: or they Award a thing the party hath no means to come by: Or the Award is not finall and definitive: or the Award is of a thing impoſſible or unlawfull, or of a thing apparantly unreaſonable, or it is imperfect or inſenſible. After. when ſome due circumſtance is not obſerved after, as publication or notice of the Award, according to the ſubmiſſion or the like. For all or any of theſe cauſes, an Award may be become void, As for examples.

Before the Arbitrement.

If one ſue for a Debt upon a Record or ſpecialty: and this be put to Arbitrement: and an Award is, that he ſhall pay all or ſome part of it; this is no good Award, for the matter is not Arbitrable. See the anſwer of this Queſtion, in the four firſt Queſtions before, what perſons may ſubmit. *Countermaund.* The duty of Arbitrators. *Matters Arbitrable.* 10. *H.* 7. 4.

In the Arbitrement it ſelfe for uncertainty.

If there be divers Treſpaſſes referred to Arbitrement; and the Award is, that the one ſhall make the other amends, and ſay not what; This is a voyd Award. 8. *Ed.* 4. 11. 39. *H.* 6. 9.

If an Award be that one of the parties ſhall enter into an Obligation with Condition to do any thing, and ſay not, of what ſume the Obligation ſhall be, or that one ſhall give a Releaſe to the other, and ſay not what Releaſe. *Coo.* 5. *Sa-mont caſe.*

If the Husband only do ſubmit, and the Award be that he and his wife ſhall do, have or take any thing; the Award, as to the wife is voyd, and ſo is it if it were of a ſtranger, any other beſides his wife. As an Award that one of the parties, and the Arbitrator, or any ſtranger ſhall do an Act is void, as to

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For want of privity in such by whom or to whom to be performed.

the Arbitrator: So an Award that the party and his wife, shall enjoy the Land in question: or that either party shall make a Feoffement, or pay money to a stranger, is so void as to the stranger, that for not doing these things by, or to the stranger, no Action will lye: An Arbitrement, that one of the parties shall do a thing wherein the Assistans of others that are strangers, and whom he hath no means to compell thereunto, is not good for so much as concerneth such stranger. *Coo.* 10 131. *Kelw.* 45.18. *Ed* 4.28. *Coo.* 5.78.19 *Ed.* 41.28. *H.* 6.13. *Trin.* 9. *Jac. Tydderlyes case Banco Regis* 17. *Ed.* 4.15.5.18. *Ed.* 4.23.19. *Ed.* 4.1.

For that which is not conteyned in the submission or in pursuance of the authority.

When a stranger is by the Award to do something, this is voyd for this cause also, because it is out of the Submission. *See the last division.* 19. *Ed.* 4.1.

The Arbitrement that is made of a thing that is not conteyned within the submission is void: As if the submission be for all Actions personall, and the Award be made of and about Actions reall. *Et sic e contra.* So if the submission be on a condition (which is usuall) as when the condition is to stand to an Award, so as it is to be made by a day certaine, or be in writing, or under Seal, and delivered by a day, and the Arbitrators make it after the day, or do it not so as before This Award is void: So if the submission be for all matters between them untill the tenth of *May*: and they award that a Release shall be given of all Actions untill the twentieth of of *May*, this is a void Award: So if *A.* on the one side, and three others of the other side submitt to Arbitrement for all Actions and demands between them: And the Award be made of some matters between them three, of the one side only this is not good (2) So if the submission be of all causes depending between them, *ab initio mundi, &c.* and the Award be of all causes *a principio*, omitting depending this is voyd: So if a Submission be to four & three of them make the Award. But if the Condition of an Oblig: to stand to Award be, to stand to the award of four so as the Award of the said Arbitrators or any three of them be made, *&c.* In this case an Award made by any three of them, is good: so if the submission be of divers particulars, with a Condition, for as an award be

made

made of the premiſes, &c. if all the differences, or ſome be made known, and they do not make an Award of as much as is notified. But if the Condition were for all matters, or between divers perſons: and ſome matters only, or all between ſome of the perſons only are notified, an Award of them alone is good: And if the ſubmiſſion be of divers things in particular, without any ſuch conditionall reſtraint or concluſion. an Arbitrement upon any of them is good. *Vide plus ſupra et infra.* 7 *H* 6 40. 19 *H.* 6 36 36 *H* 6 11 *Plow.* 306. 9 *Ed:* 4 44 8 *H* 6 18 *p* 9 *Jac. B. Regis Scotts caſe Dyer* 242. *Co.* 8 92 *Co.* 10 132. *v. Deli: ſule Margent* 2 *R* 3 18 36. *H* 6 8. (2) *Adjudge Haynes Perkins Armiſtead. Adjudge vers. caſe B Regis. Co.* 8 98 *Dyer* 216 *Cyprian Sallows caſe p.* 9. *Jac: B Regis.*

If the ſubmiſſion be by Deed, and a time ſet, and the Arbitrators meet and proroge it to a time after the day and then do it: this is not good, but if it were without Deed, it ſeems otherwiſe: and if they make an Award one day, and after before the time make another, or make part one day and part another, before the time ſet: or part before the day or part after, in theſe caſes without a new ſubmiſſion, theſe awards are not good; But if they meet and agree only, and at another day within the time make the Award, this is good. 49. *Ed.* 3 9: 22 *H.* 6 52 33 *H* 6 28 39 *H* 6 12 8 *Ed* 4 10 19 *Ed.* 4 1

If the ſubmiſion be of all ſuits and controverſies then depending, and the Award is made of a controverſie, not in ſuit, this is good. *Per curiam B. R. M.* 10. *Car.* *For that it is not ſatisfactory*

If the Arbitrement do not import ſatisfaction of the wrong that is put in compromiſe it is not good. As for examples.

If the differences be about Arrearages of Account, and this be referred, and the Award is, that the party in arrearages ſhall accounnt; So if the Award be, that becauſe one of the parties had the goods of the other, that he ſhall redeliver them. But if by that redelivery, the party to whom may have ſome ſpecial benefit, then the ward is good enough. So an Arbitrement, that one party ſhall haveone part of the thing in queſtion, and the other the other part (c) if it be Debt in queſtion,

ſtion, and the Award be, he ſhall pay part of the debt (7) So if an Award be that one that is ſuppoſed to have done a treſpaſſe ſhall do his Law, and then be quit and diſcharged (8) So if the Award be, that in recompence of the wrong the parties ſhall enter-marry (9) So if the Award be, that one of the parties ſhall do ſuch an act, ſuch a day, and the day be paſt before the Award finiſhed. *Fitz. (2) Arbit.* 27 (3) 12. *H.* 7. 15. 45. *Ed.* 3. 16. (4) 2 *H.* 5. 2. 14. *H.* 4. 14. (5) *Fitz. Arbit.* 19. (6) 15 *Ed.* 3, 16 (7) 46 *Ed.* 3. 17. (8) 9 *Ed.* 4. 44 (9) 3 *Ed.* 4. 11. 8. *Ed.* 4. 22.

For that it is made of one part only.

So if a Suit be put in Arbitrement, And the Award be that the Plaintiffe ſhall not proceed, or ſhall be Non-ſuited or the like, it ſeems theſe are not good Awards. 19. *H.* 6. 36. *Plow.* 11. 5. *H.* 7. 2. 21. *H.* 7. 28. 36. *H.* 6 15. *Co.* 8. 98. 7 *H.* 6. 40.

An Arbitrement, that one ſhall pay money to the other, and then the other ſhall releaſe all Actions, is good.

If between the Garniſher and the Plaintiffe in a Detinue, the Award be, that the Garniſher ſhall go quit of all quarrells and Suits had by the Plaintiffe againſt him, and nothing be ſaid for the quarrells of the Garniſher had againſt the Plaintiffe. So if all matters be referred between two, and the award be, that the one party ſhall go quit of all actions, that the other hath againſt him, and ſay nothing of the actions he hath againſt the other, theſe are not good awards. And yet if a man demand five pound of *B.* for buſineſſes he hath done for him, and this be referred to Arbitrement, and the Arbitrator award that *B.* ſhall pay to *A.* foure pound in full ſatisfaction of the ſame debt, and no more, this is a good award. *Somer verſus Bradfield Adjudge Trin.* 37. *Eliz. B. R. Co.* 8. 98. 7. *H.* 6. 40.

If an Award be that one party ſhall pay ten pound to the other, and doth not ſay for what, or that the other ſhall goe quit for the like, this is not good, and no Averment *per Juſt. Berkley, R. R.* 1. *L. Car.*

For want of means to obtaine the thing.

If the Award be, that one of the parties ſhall have land out of anothers hands, this is voyd, for this order doth not give the Franck-tenement, but yet *ſecundum quid*, only, for if there be any bond or Aſſumpſit to performe the Award, and it be

not performed, yet one may sue upon the Bond or *Assumpsit*. *Plow*: 11.20. *H* 6.52. 5 *Ed*:4.7.19 *H*:6.36.

An *Arbitrement*, that the parties or either of them shall do something by the advice of the Arbitrators, or one of them, is not good. 19 *Ed*:4.1. *Not definitive or finall, or by words.*

An *Award*, that if one of them will wage his Law, he is not guilty of the Trespass, that then he shall goe quite, and the other shall release to him, is not good: So if the *Award* be, that the parties shall abide the *Award* of others, or of the Arbitrators themselves at another time, or shall do as another shall set down, or the like: So also if an *Award* be that the Plaintiff shall be Non-suit, it seems this is not good, for he may then begin again. 46 *Edw*.3.17. *Cro*:5.78. 47 *Ed*:3.20. *Plow*:11.19. *H*.6.36.

If a Submission were to Arbitrators, and after to an Umpire, and the Arbitrators make an *Award* of parcell, and the Umpire of the rest, this is not good; unlesse the Submission were so made that the Umpire might make an *Award* of any part of it. 39 *H*.6.10.

An *Award* cannot be made part at one time, and part at another. 39 *H*.6.12.*a*.8 *Ed*:4.10.*b*.39 *Ed*:4.11.*a*.

If the Arbitrators make an *Award* between the parties one day, they cannot make another *Award* between the parties another day. 22 H.6.*b*.52.*a*.

If a debt of 20 *l*. be in question, and the *Award* is the party shall pay more then the debt, is not good. 9 *Hen*.7.16. *Keble*. *Unreasonable.*

So if it be that one shall release the surety of the peace to *W*. *S*. and in truth there be no such matter. 21 *Edw*.4.40. 9 *Ed*:4.44.39.

An *Award*, that either of the parties shall release to the other all Actions till the day of the award, is unreasonable and voyd; for then the *Obligation* or *Assumpsit* will be released also, that was made to perform the *Award*: So divers before for their unreasonableness in other particulars, are voyd. *H*. 6.10.21 *H*.7.28.

An *Award* that the one shall release to the other such a suit he hath against him, when as in truth he hath no such suit in being. 20 *Ed*:4.38. *Impossible.*

Against the Law.

An *Award* that one shall robb another, or disseise him of his free-hold, or the like, are voyd.

Uncertaine, or imperfect.

If a *Submission* be of all the Lands descended, and the *Award* is of White acre and Black acre an Averment may be, that this is all the Land descended, and by this the *Award* may be good. *per Just. Berkley*, 11 *Car. R. B.*

After the award, or by matter, ex post facto.

If the Submission be made with Condition, so that the same *Award* be notified to the parties, or some of them by a day, and the *Arbitrement* be well made, but it is not after published or delivered according to the tenor of the Condition, then is the Arbitrement voyd, and the Publication must be as the Condition is: If by such a time, or under Seale, *&c.* then it will not be good, unlesse it be so done: But if the Condition were so that it be delivered to the parties before a day *petentibus hoc*, here they are not bound to deliver it till it be desired: If the Submission be by divers of both sides, provisor it be delivered to the parties, or one of them: If he deliver it not to some, or one of them, the *Award* is voyd; but if he deliver it to any, or either of the one or the other side, it is a good *Award*: So if the Submission be by two, so that the *Award* be delivered to either, or *utrique eorum* before *Michaelmas*, and it be delivered but to one, it is not good. See this question before above in the negative question. 8 *Ed:* 4. 21. 11. 1 *H:* 7. 5. *Dyer* 218. 37 *H:* 8. *Br: Cond:* 46.

What not. Before the award.

Power,

An *Award* that a thing shall be done by the advice of a stranger that is not party, or privy to the *Award*, is good enough. 8 *Ed:* 4. 11. 14 *Ed:* 4 1.

An *Arbitrement* that the party shall do a judiciall act is good, though it cannot be done without the help of strangers. 19 *H* 6. 38. 19 *Ed:* 4, 5. 5 *H* 7. 22.

Being contained in the Submission or pursuance of the authority.

If the Submission be of things personall, and the *Award* is, that one of the parties shall do an act, that is, of a thing reall in satisfaction of the personall wrong, *& sic e contra*: So if the Submission be of one thing, and the Arbitrement of any thing incident to, or depending necessarily upon that thing, it is good. So if the Submission be of all Actions reall and personall, and the *Award* be only of matters personall, or of the matters reall, it is a good award; for so much especially, if no-

no other matters were notified to them: But in that case, if the words or manner of the Submission be conditionall, that the *Award* must be of all matters or none, there it may be otherwise: So if the Submission were of the right, title, and possession of Land, and the *Award* be made of the possession only, and nothing said of the Right, yet it is good for so much. So if *A:* on their side, and three others on the other side, doe submit to the *Award* of *W.* and he do award some matters that are between the three and *A.* joyntly; or matters that are between any of the three and *A:* this is a good *Award*: So if a Submission be of all suits, and the *Award* be, that the one shall release to the other all Suits, Debt, *&c.* except one obligation in particular, this is a good *Award*: So if there be divers suits and controversies about tythe and other matters between two, and they submit these to *Arbitrement*, and he award that all controversies between them shall cease, and the one shall pay to the other twenty pounds in recompence of all wrongs: This is a good *Award* for the tyth. *Adjudg: Ingram* ver. *Webb*, *Trin:* 18 *Jac: B. R.* And if the difference is between a thing severable, and a thing entire, as the making of a Release in the case *supra*; for there if the *Award* exceed the *Submission*, it is voyd for all: So if *A* and *B* 1 *Maij* submit themselves to *I S* for all matters from the beginning of the world unto the date of the *Submission*, and in *June* following they make an award that *A* shall pay to *B* ten pounds, *&c.* and that *B* shall make him a generall release, and that this shall be an end of all matters between them from the beginning of the world untill the date of the *Award*, this is a good *Award*. *Adjudg*; but if other matters be shewed in pleading to be between the parties, between the date of the *Submission* and the date of the *Award*, *Contra.* 9 *Ed:* 4. 44. 8 *H* 6. 18. 9 *H* 7. 15. 7 *H* 6. 40. 36 *H* 6. 11. *Cook* 8. 98. *Dyer* 216. 19 *H* 6. 6. *Br:* 2 *R* 3. 18. 36 *H* 6. 8: *Br: p.* 9 *Jac: Sallows case*. *Lee* versus *Paine*, *Hill:* 14 *Jac:* *Cro: B. & 43 Eliz: Co: B. Barns case.*

If an *Award* be, that he that hath done the wrong shall give the other a quart of Wine, or ever so little recompence for the satisfaction of the wrong, it is good enough: so wher divers of the one party and the other submit, and the *Award* is, that one *Satisfactory.*

one of the one side, shall pay to another of the other party so much, and give nothing to, or from any of the rest, this is good enough: so an *Award*, for that the wrongs are equal from either party to the other, therefore either of them shall go quit against the other: So if it be that either of them shall release to the other: So if it be that either party shall goe quit against the other, and the one shall pay the other so much, because his wrongs he did were more: So if two have suits each against other, and they be referred, and the *Award* is, that they shall each of them be Nonsuit, or discontinue their suits, and not sue again for those matters, or enter a Retraxit, are good. 43 *Ed:* 3. 33. 9 *Ed:* 4. 44. 22 *Ed:* 4. 25. 19 *H:* 7. 37. *Fitz: Arb:* 9. 9 *Ed:* 4. 44. 10 *H:* 6. 4. 20 H: 6. 19. 5 *H:* 7. 22. *Fitz: Arb:* 9.

An *Arbitrement* that one shall release to the other all his right in the land in question, is good; if it appear by the *Award*, that he to whom the Release was made, were in possession of the land. 9 *Ed* 4. 44. 21 *Ed* 4. 40.

Of the one part only.

If the controversie referred be about a debt of ten pounds due by a contract, and the *Award* is, that he shall pay forty shillings costs, it is good, for hereby he is discharged of the debt that doth pay it: So if divers trespasses done by one of the parties be referred, and the *Award* be, that he that hath done the trespasse shall pay ten pounds for the trespasses, and say nothing of the other, this is good; for hereby the other is discharged of any Action for those trespasses: So if the *Award* be, that whereas one of them hath received twenty shillings of the other, and hath done him divers trespasses, as also the other hath done to him divers trespasses, that the one therefore shall pay to the other his twenty shillings, and that they shall goe quite one against another: So where divers matters be of both sides, when the *Award* is, that they shall be friends, and all controversies and matters shall cease, and the one shall pay the other twelve pence: So if there be divers of both sides, and the *Award* is, that one, or some only shall pay to one, or some only of the other side. *Co:* 8: 98: 22 *Ed:* 4: 25: 20 H: 6: 19: 12: *Colas case* 7 H. 4: 31: *M:* 8: *Jac:* 20 H: 6: 18: 10 H: 6: 4: 19: H6: 6:

If

If an *Award* be, that one shall levy a Fine, make a Feoffment, enter a Retraxit by Nonsuit, or discontinue his action, or make defaults in a *precipe quod reddat*; in all these cases, though the concurrence of the acts of others be necessary, yet it seems the Awards be good. 5 *H*: 7:22. *Means to make or obtaine the thing.*

If a stranger had drawn an *Award* before, and the *Award* be that the parties shall perform that Award, it is good. 8 *Ed*: 4: 10: 39 H: 6: 10.

If the Arbitrators meet, and commune one day of the Award, and make it after another day at a new meeting within the time given them, this is good; but they cannot meet, and make a part of the Award one day, and meet after, and make the other part another day, it seems this is not good. 39 H:6:12:8 *Ed*:4: 10: 19 *Ed*:4.1:3 H: 4: 1.

Award that the parties shall be bound, or shall make assurance by advice of Councell, or that an action shall be sued between the parties by advice of *A*: is good: 18 *Ed*: 4: 22,23: 8 *Ed* 4: 1: & 4

If the Arbitrement be, that the party that hath done the wrong shall pay a greater sum in value then the wrong is that he hath done, this Award is good. 8 *Ed*:4:21: *Reasonable.*

An Arbitrement that one shall give the other a thing he hath not, is good, if it be to be had, and he must provide it. 19 *Ed*: 4:1. 9 H:7:16:

An Arbitrement, that one of them shall give security for the performance of a thing to be done, is reasonable & good. 8 H:6:18: 19 H:4:1:

An Award that the one party shall pay to the other 10*l*. & release to him all Trespasses, and that the other shall release to him againe is good, yet he cannot compell him to release; but he may sue him or the Bond, or *Assumpsit*. 20 H:6:18:

If one be bound to stand to the Award of four of all actions, &c. So that the same be made in writing, and delivered such a day by the Arbitrators, or any three or two of them: If any two of them deliver it, it is good enough. *Sallars case*. *After the award, or for matter, ex post facto.*

If the *Submis*. be with Condition, so that the Award be delivered before such a day, & the Arbitrators deliver it by word of mouth, it is a good Award; but if the Condition had beene, that

that it ſhould have been delivered in writings, *Contra*: And if in this caſe the Award be made in one County, and delivered in another, yet it is good enough. *Dyer* 218: 5 H:7:7:

If the Submiſſion be by divers on both ſides, with condition that the Award be delivered to the parties, or one of them: If the Arbitrators deliver it to both or all of one ſide, or to one of either ſide, it is good enough, *Dyer* 218.

If the *Submiſſion* be with Condition that the Award be delivered before *Michaelmas*; if it be delivered the laſt day before after Sun-ſet, it is good enough. *Adjudg. Parkers caſe*, *M.* 37 & 38 *Eliz. Co. B.*

The expoſition of an award, & how it ſhall be taken.

Though an *Arbitrement* be a Judgment, yet it is not like to other Judgments that are taken more ſtrictly, for this ſhall be taken according to the intent of the Arbitrators, if the intent will ſtand with Law, elſe the parties ſhall perform it according to theſe words, in ſuch ſenſe as they will agree with Law. 17 *Ed:*4:3:21 *Ed:*4 39:19 *H:*6:36.

If an Award be that one ſhall pay to the other twenty *l.* at *Michaelmas* next coming, provided that for ſecurity the extents and leaſes ſhall remain in force: and if he pay not the twenty pounds at the day nor put in ſecurity ſuch as the Plaintiff ſhall like of, then the leaſes and extents ſhall remaine in force: This is an abſolute award for the money, and the words (nor put in ſecurity) ſhall referr only to the ſaving of the leaſes. *Adjudg. Dightons caſe*; *M.* 2 *Jac. B. Regis.*

How an award ſhall be performed.

The parties are bound to do all that they can to perform their *Award*, and it muſt not be done in part only, but part may be at one, and part at another time. 21 *Ed.* 4. 39. 8 *Ed:* 4.10. 6 *H:*7.

If the *Award* be that the one ſhall pay to the other 10 *l.* for all wrongs, and then that the other ſhall releaſe all Actions, *&c.* Now in this caſe the other ſhall not be bound to releaſe, till the other pay him the money; and ſo in all like caſes when another is to do an Act before the party is to do his act, if the other do it not, he is excuſed: But if the *Arbitrement* be that one ſhall pay money, and that the other ſhall releaſe without any ſuch reference of time, then or the like, either

muſt

muſt perform his part at his perill. 21 *H*:7.28.10.36 H:6.15. 5 *Ed*:4.7 21 H:7.28.

If no time be ſet by the Award for the doing of a thing, the party ſhall have a reaſonable time to do it. 20 *Ed*:4.8.21 *Ed*: 4.41.

If a thing be ordered to be done, which may be done two wayes, in one whereof the concurrence of a ſtranger is neceſſary; in the other it may be done by the party himſelfe, it ſhall be done that way in which the party may do it himſelf. 21 *Ed*: 4.40.

If an *Award* be that one ſhall make and ſeale a Bond or Releaſe, *&c.* He that is to do it, muſt get it made, and muſt ſeal it at his perill, *Brown & Donngors caſe. Trin.* 18 *Jac. B. R. Coo.*5.77. *in margin.*

Where an Arbitrement is a good plea, and where not.

Arbitrement is a good plea in all Actions perſonall, though the *Submiſſion* be not by deed: So alſo to all Actions that are grounded on an Eſpecialty when no certain duty doth acrew by the deed *tempore confectionis*; but a wrong and a defaule ſubſequent together with the Deed giveth an Action to recover Damages, as upon a Covenant to repayr, or that he hath power to leaſe a Tearm, and ſuch like. *Coo*:6.44 14 *Ed*: 4.18.*Coo*.9.60.

It is a good plea alſo, in an Action of *Debt* on a Leaſe for years, or on a Contract: Alſo in an Accompt of a Receipt *per auter mayne*: Alſo in a *Forger de faux faits*: Alſo in a Ravithment *de gard*: Alſo in mixt Actions, if the *Submiſſion* be by deed: And in all ſuch Actions wherein an Accord with ſatisfaction is a good plea: Alſo it is ſayd an *Arbitrement* is a good plea in an Action upon the Statute of Labourers: Alſo in a Writ of *Annuity*, if the *Submiſſion* be by Deed. *Broo. Arbitr. Dyer* 75.26.19 *H*:6.36. 14 *H* 4.24.6 *H*.4.6.*Fitz. Arb.*

But in *Debt* upon an Eſpecialty, or Arrerages of Accompt before Auditors, or in a Controverſie grounded on matter of Record: In all reall and mixt Actions, *Arbitrement* is no good plea. *Coo. b*.44. *B. R.*

How an Arbitrement may be pleaded.

He that pleadeth an *Arbitrement*, muſt ſhew that he hath performed his part, and how, and wherein; or that he tendred

dred, and the other refused, for this will excuse, or say he is ready to perform it: And if divers things be to be done on the one part, in some of which the *Award* is voyd, and thereupon other things are to be done by the other side; if he shew he hath performed the *Award* so farr forth as it is good, the other must perform his part; and he that will sue upon an *Award*, must say he hath done all that is to be done on his part, and wherein in particular the other hath broken the *Award*. *Coo.* 10. 131 7 *H.* 4. 31.

Accord and Concord. What agreement shall be an accord, and what shall be a sufficient accord and good barr in action.

It is sometimes taken for an agreement between two or more that intend the levying of a fine of Lands one to another, how and what manner the Lands shall be passed (For which see *Fishe*) but here it is taken for an agreement between two or more, to satisfie and make amends to another for some offence done to him; which being performed accordingly, though he give not the tenth part of the damage, it is a bar in any action brought for the same offence: And this is either Absolute & executed, or Executory. That which is *executed* is such an Accord as is performed according to the Agreement. *Executory* is that which is not yet done, but agreed only to be done. *Plow.* 5, 6. *Dyer* 356. 39.

The qualities of a good accord.

To the making of a good Accord that may be a barr in an Action for any wrong done, these things must concur.

1 The thing given and received must be valuable, and satisfactory, a charge to the giver, and a benefit to the receiver.

2 It must be perfectly and compleatly finished and executed, and satisfaction made according to the agreement before any Action brought.

3 It must be in the life time of him that did the wrong.

4 The party to whom the wrong is done must accept the Amends according to the agreement, for it seems notwithstanding the Accord, he may refuse it, and Tender of Amends without an Acceptance thereof is no plea in any Action, but being accepted is; for as wrongs and injuries cause discord and variance, and beget suits, so by an Accord between the parties, this may be recompenced, and this recompence begetteth peace. *Dyer* 356. 6 *H.* 7. 11. *Fitz. Accord.* 4. *Dyer* 75.

17.

17 Edw. 4. 2. Co. 9. 79. 5 Ed. 4. 7. Old Books of Entries fol. 6. Dyer 336.

In a forger of false Deeds; If the Defendant give to the Plaintiff a bottle of Wine in satisfaction of the Trespass, and he agree to it, this is a good Accord, and a barr in the action. 9 H. 6. 29. Fitz. Barr 146.

If divers do a trespasse, and one make a good Accord, this will discharge, and be a barr to all the rest. Co. 9. 79.

If a stranger as one of the Parents or Friends of the Trespassor give the Amends in recompence, it seems this is as good as if the party himself did give it. Barre 166.

In *Detinue* for a Chest and Charters therein, by the delivery of the Plaintiff: The Defendant pleads an Accord, that he should keep the Chest untill the Plaintiff come to *Bristoll*, and there it shall be opened, and if any Deeds be there that do concern a house of which the Plaintiff had enfeoffed the Defendant, that he shall keep it still, and saith, that he never came to *Bristoll*, and it was awarded a good Concord. But *Quere*. Fitz. Accord 2. 7 Ed. 4. 23.

If one be amerced for a private Nusans or Trespasse done to the Lord in his Leet, and he receive the *Amercement*, though it be Extortion; and he could not have recovered it, yet it seems if he after bring an Action for this Nusans, this acceptance of the *Amercement* may be pleaded in barr. Fitz. Barr. 187. 222. Br. trespasse 195. 61. 66.

If one plead that whereas there were divers trespasses committed by each of them one upon another, and by mediation of Friends, they agreed one should goe quite against the other, this is no plea, neither will it barr in the Suit: So in an Entry on the Stat. of *Riche*, That the Plaintiff shall re-enter, and have his Land in peace, and that he shall deliver him the writings that he hath that doe concern the Land. Dyer 336. 16 Ed. 4. 8. 9 Ed. 4. 19. Fitz. Accord 21.

So if it be in trespass for goods taking, and the Defendant plead an Accord made that he should have his goods again. 9 Ed. 4. 19. 30 H. 6. 4.

So if it be that the Defendant should do his endeavour to make the Plaintiff and another who was at odds with him a-

What not. For default of the value.

greed: or (as it seems) to shew that he did make an Accord between him and the Stranger, unlesse he shew withall that he was at some charge to do it. *Fitz. Accord.*

For default of Execution.

If the Defendant plead an Accord, that he must make windowes, and pay ten pounds a day to come; and he set forth that he hath made the windowes, but he doth not set forth that he hath payd the ten pounds, this is no barr. *6 Hen.* 7. 10.

In trespasse the Defendant pleaded an Accord to pay sixe pence to the Plaintiff, and to give him counsell when he shall require it, this is no good plea. *27 Ed.* 4. 2.

Tender of money without payment is no good plea in barr of any Action. *Old N. B. f.* 122.

If the Accord be between the parties, and be executed by the Heyr or Executor of the Trespassor, this is no barr where any Action may lye against the Executor. *Dyer* 356.

For other cause.

In a writ of false imprisonment, the Defendant saith, that it was agreed between the Plaintiff and him, that he should bring the Defendant to such a place, which is the same imprisonment, and it seems this was no good plea. *Fitz. Barr.* 14.

In what actions Accord shall be a good plea.

In all Actions wherin an Arbitrement is a good plea in Bar, an Accord executed is a good Bar: As in all personall Actions founded on a wrong, wherin damages only are to be recovered; as in Actions of Trespass, and upon the Case, *Sur Assumpsit* or otherwise, Attaints, Appeal of Maytime, Covenants to repay, or the like: Maintenance, Conspiracy, Waste in the *Tenuit*, Porger of Faits, Ravishment of Gard, Debt upon a Contract: In all Actions also wherin Chattels reall or personall are to be recovered, as *Ejectione Firmæ*, *Quare ejecit infra terminum*, Waste against a Lessee for year, Detinue of Goods or Charters, which concern Free-hold; and in all Actions wherin the wrong is supposed to be *Vi et armis*, and wherin *Capias & Exigent* doth lye at common Law. *Co.* 6. 44. *Dyer* 76. *old book of Entries, fol.* 6. 19 H. 6. 52. *per Curiam Tr.* 7 *Jac. B. Regis Co.* 4. 1. 13 H. 7. 20: *Co.* 9. 78: 6. 44. 90. *Ed.* 3. 25. 35 H. 6. 8.

In all Actions reall for any Free-hold or Inheritance, or mixt, as Assise or Waſt in the *Tenet* this is no bar (but in ſome caſes where certain Statutes make it a Bar, as in a Joynture) and therfore an Accord with ſatisfaction is no plea in thoſe Actions: So likewiſe in all Actions founded, as a Record, or a Specialty, as an Obligation, or Debt on a Leaſe for years; or in an Account before Auditors, but where it is founded partly on a Record or Specialty, and partly on a Deed, there it will lye as in Attaint and ſome of the caſes above. *Coo:* 9 79 4 1 6 44 13 H: 7 20 10 H: 7 4 13 *Ed:* 4 5 *See Liver: Condition* 181 *Debt:* 122.

where an accord or agreement to take one thing for another ſhall bind, where not.

If one be bound in a Statute or an Obligation to do a Collaterall Act, as to make a Feoffment, Account, or the like, here an Accord with execution for any other thing as mony, or the like, is no plea to ſave the Forfeiture of the Obligation: But, if the Condition of the Deed by the originall Contract of the parties be to pay mony, there by agreement between the parties any other thing may be given in ſatisfaction of it, whether the mony in the Condition be a collaterall ſum, or parcell of the Obligation. *Dyer* 1 *Coo:* 9 79 12 H: 4 23 9 H: 7 4.

If one be bound in two hundred quarters of Corn, in condition to pay twenty pounds, the Obligor may by agreement between them pay him a Horſe for it: But if the Condition were to pay fifty quarters of Corn, he cannot give mony or any other thing in ſatisfaction of it by an Accord to ſave the Obligation. *Coo:* 7 9.

Apportionment.

It is the dividing into parts of ſome thing divideable (and not entire and whole) by reaſon of the Diviſion or Alteration of ſome other things out of which that did come, or on which it hath dependance, or otherwiſe; As Rents, Commons, Conditions, Contracts, Obligations, Suits of Court, Debts, Covenants, Authorities Damages, About which all the Queſtions touching Apportionment are moved, *Termes ley Coo: Super: Lit* 147.

And theſe things divided or altered which cauſe this Aportionment, are ſo divided or altered ſomtimes by the Act of God alone, and ſomtimes by the Act of God and Law together,

1. The Act of God and Law together.
2. The act of the Law alone.
3. The act of the Law and Party together.
4. The act of the Party alone.

ther, and somtimes by the Act of Law alone, and somtimes by the Act of the Law and the Party together, and somtimes by the Act of the Party alone: And by these means such Rents, Commons, &c: that did issue out of them or depend upon them be somtimes extinct, and somtimes suspend, and somtimes apportioned, and somtimes continue entire and unaltered, as in the Examples following: *Coo:* 10 128.

Rents and Services severable, Commons, Conditions annexed, for Estates, may be apportioned.

2. What things are apportionable and what not.

But Conditions of Obligations, Contracts, Suit of Court, Services entire are not apportionable.

A Rent-charge shall be apportioned by act of Law, and by act of Law when it is mixed with the act of the party, but not by the act of the party. *Coo. Super Lit:* 49. *Coo: Super Lit:* 150.

Where and in what case apportioment may be, on Rent or other Services.

If I let a flock of Sheep, Horses, or Land to one for years, rendring Rent, and part of the Sheep be killed, Houses burnt, or Land drowned by the act of God, if so be it be without any negligence or default in the Lessee; here the Rent shall be apportioned with respect to so much as is gone. *Dyer* 56.

If a Lessee for life make a Lease for years, rendring Rent at *Easter*, and before the Feast part of the Land bee evicted, and the Lessor live till after *Easter*, and then dye, here the Rent shall be apportioned, and so much abated as is of the Land evicted. *Coo:* 10. 126.

If I let Lands or Goods for years, rendring Rent, and during the Tearm a stranger recover part of the Lands or Goods by a good Title, in this case the Rent shall be abated and apportioned, having respect to what is recovered; As if I be seized of two acres of Land one in fee and the other in tayl: and I make a gift in tail, lease for life or years of both, rendring Rent, and after my death the Issue in tayl avoideth the Gift or Lease for the one acre, here the Rent shall be apportioned. *Coo:* 10. 128 *Dyer* 8. 67. 212. 38. 56. 7 H: 7. 4. *Coo: Super Lit:* 148.

If I be seized of two acres of Land, the one in Borrough-english, the other in Gavel-kind, for years, rendring Rent, and have Issue two sons and dye, and the Land go betwixt them

them (as it muſt) in this caſe the Rent ſhall be divided between them. *Dyer* 46.

If a Leſſee for years or life do ſurrender part of his Land, or do commit Waſt, or make a Feoffment of part of his Land, and the Leſſor recover the place waſted, or enter on the Land aliened for a Forfeiture (as he may) or if he enter upon part upon the breach of a Condition, in this caſe the Rent ſhall be apportioned, and he ſhall pay but *pro rata.* of the Land is left in his hands. *Dyer* 45: *Coo: Super Lit:* 148. 214.

If my Father purchaſe part of the Land, out of which I have a Rent-charge, and dye, and that part of the Land deſcend upon me, in this caſe the Rent ſhall be apportioned and I ſhall recover a part of the Rent ſtill, according to the value of the Land: And ſo it is if the Tenant of the Land make a Gift in tayl of part of the Land to my Father, and this deſcend to me: And ſo it is alſo if my Father be Grantee of a Rent in Fee, and I purchaſe part of the Land charged, and my Father dyeth, and the Rent deſcend to me: And ſo it is alſo if the Grantee grant the Rent to the Tennant of the Land and a ſtranger, the Rent ſhall be apportioned, and is extinct but for a Moyety, and the Grantee ſhall have a part of it of the ſtranger ſtill. And in all caſes where any part of the Land deſcend to him that hath the Rent-charge, the Rent ſhall be apportioned. *See Coo: Super Lit:* 149. *L: Lit: Sect:* 224. 34 H: 6. 41. *Plow:* 419. *Coo: ſuper Lit:* 149.

If a man have Iſſue two Daughters, and grant a Rent-charge out of his Land to one of them, and dyeth, the Rent ſhall be apportioned: And ſo if the Grantee in this caſe enfeoff another of her part of the Land, yet the one half of the Rent remaineth out of her Siſters part, and after partition ſhal be revived: So if one have a Son and Daughter by one Venter and a Daughter by another, and grant a Rent-charge to his Son in Fee, and he dye, and the Rent come to his Siſter, and after the Land come between them. *Coo: ſuper Lit:* 225. 7 *H:* 6. 3. 34. *Aſſ. p.* 15.

If one ſeiſed in Fee of Land, take a Wife, and make a Feoffment, and the Feoffee grant a Rent-charge to the Husband and Wife, and after the Husband dye, and the wife is endowed

ed of part of the Land out of which the Rent doth go; now two parts of the Rent shall continue and be apportioned, and the third part extinct. *Coo.* 9. 135. 20 *Ass. p.* 10.

One having a Rent-charge of twenty shillings, grants ten shillings part therof to a stranger; this is a good Grant, and therby the Rent is apportioned. 9 *H:* 6. *B:* 13 *A.*

One having a Rent-charge of twenty pounds, releaseth to the Ter-tenant five pounds parcell therof, this is good. *Old Tenures* 10. *B.*

A: doth lease to *B:* for life, rendring a Rent, and doth after release part of the Rent, this is good. 9 *Ed.* 3. 8. *Br. release* 83.

Rent-seck which was once Rent-service, is apportionabl.

If two Daughters, and Heirs be, and one is full age, and the other not, the Services shall be apportioned, and the Lord shall have the Moyety still. 7 *H* 6 3. *Br. entring* 17.

If one have a Rent-service of mony or Corn, or Pepper, &c. issuing out of land and purchase part of it in fee the whole Rent is not extinct, but shall be apportioned *juxta valorem terræ*, and so also it is of other Services if they be dividable, but if they be entire and they be valuable as a horse, or the like, then they be gone and extinct; But if it be Homage or Fealty, that doth continue: And if parcell of the Land held by such entire Service come to the Lord by descent; If the Service be Suit-service that are annuall, that they are extinct also; And if they be yearly and valuable as a Horse, or the like, that they shall be multiplyed, and not apportioned in neither case: So if the Service be *pro bono publique*, yet they shall not be apportioned, but continue entire still. *Coo. super Lit:* 143. 149. *Coo.* 9. 135. *Coo. super Lit.* 149.

If one lease three acres rendring three shillings Rent, and a stranger buy the Fee of one of them, or the Lessor devise by Will the Fee of one of them, now the Rent shall be divided, and the Purchasor shall have seven pence of the Rent. So if the Tenant make a Feoffment of parcell of the Land, out of which Rent is to go to a stranger. So if the Lessee or his Assignee grant or surrender one acre to the Lessor, in this case the Rent shall be divided, and the Lessee shall pay less Rent by so much; and this is true though it be in case of the King,

that

that the Reversion is this. *Coo. super Lit. f.* 149. 148. 147. *Dyer* f. 4. & 5.

If there be Lessee for years, rendring Rent, and he assign his Tearm to the wife of the Lessor, and a stranger, the Rent shall be apportioned, and the stranger shall pay half during the life of the wife. *Plow.* 10.

If one make a Lease of two acres, rendring Rent two shillings, on condition that if he do such an Act, he shall have the Fee; now if the Contingent happen and that he have the Fee of one, then the Rent shall be apportioned. *Coo. super Lit.* 148.

If the Gardein in Chivalry entreth into the Land of his Ward within age, now is the Seigniory suspended: But if the wife of the Tenant be endowed of a third part of the Tenancy, in this case the Rent shall be apportioned, and she shall pay to the Lord a third part of the Rent. *Fitz. Dower* 138. *Coo. super Lit.* 148.

If the Tenant give a part of the Tenancy to the father of the Lord in tayl, the Father dyeth, and this descends to the Lord, in this case the Rent or Service shall be apportioned, and so is the Law of a Rent-charge. *Coo. super Lit.* 148.

If two Joynt-tenants or Co-perceners be of a Seigniory, and one of them disseise the Tenant of the Land, the Service shall be divided, and the other Joynt-tenant or Co-parcener shall distrain for his or her Moyety. *Coo. super Lit.* 148.

Condition. Where Land to which a Condition is annexed, is divided by Act in Law, as where part is recovered by an elder title, or part doth descend, there the Condition shall be apportioned, and shall remayn to the residue. *Dyer* 309. *Coo.* 5. 59.

If one be seised of two acres of Land of severall natures (*i*) the one in Fee-simple, the other of the Custome of Burrough-English, and make an Estate of them both together on condition, and dye, and one acre descend to one Heyr, and another to another Heyr, in this case the Condition shall be apportioned, and both the Heyrs shall take advantage of it. *Coo.* 4. 120. *Dyer* 309.

If a Lease be made on condition, and the Lessee doe alien

How and in what case a Condition may be apportioned.

part of the Land leased in fee, or commit waste, and so commit a Forfeiture, and the Lessor enter, or recover it from him, in this case the Condition shall be apportioned, and remayns with the residue; For a Condition may be apportioned by act of Law, but not by the act of the party. *Co.* 4. 120.

Of a Common.

If one purchase part of the Land out of which another hath Common appendant; in this case the Common shall be apportioned. *Co.* 8. 79. 4. 37. *Dyer* 339.

Apportionment in common appendant & appurtenant.

If one have Common appendant or appurtenant to land, and he sell away part of it, in this case the purchaser shall have Common *pro rata*, and there shall be an Apportionment. *Co.* 8. 79. 4. 37.

If he out of whose land the Common is taken do purchase part of the land to which the Common is appendant, yet the Commoner shall have an Apportionment for the residue. *Co.* 4. 37, 38.

If one have Common in certain in twenty acres of Land, and ten of those descend to the Commoner, in this case the Common shall be apportioned, and he shall have Common in the residue: But if he have Common *sans number*, then he shall have Common so still. *Co. super Litt.* 149.

Of warranty, how it may be apportioned by act of the Law.

Two joynt-tenants with warranty, the one makes a Feoffment the warranty is not warrantable. 29 *Ed.* 3. 70.

If two Joynt-tenants with warranty make partition by writ, the warranty remayns by force of the Statute, 31 *H.* 8. For a warranty may be apportioned by act of Law, but not by act of the party. 38 *Ed.* 3. 20. 48 *Ed.* 3. 17. 6 *rep.* 12. *b.*

Of Execution.

If Execution be sued of Lands upon a Statute; and after the Inheritance of part of those lands descend to the Conusee, all the Execution is avoyded, and there shall be no apportionment; but if the descent had been before Execution, *contra. Co. super Litt. f.* 150.

Of an Annuity.

A. grants an annuity of ten pounds a year to *B.* *B.* grants to *C.* five pounds parcell of the said annuity of ten pounds, *A.* shall be liable to pay five pounds to *C.* *F. N. B.* 152.

How apportionment shall be made.

Rent shall be apportioned to the value of the land purchased, and not according to the quantity. 18 *Edw.* 2. *Avowry* 218. *adjudged.*

If

If one grant to another a penſion of twenty pounds yearly, whiles he doth keep him company, to be payd ſuch a day, and before the day the Grantor dye, in this caſe there ſhall be no Apportionment, but the whole Rent is gone. *Coo.* 10. 128. *Where and in what caſe not.*

If I have a Rent charge iſſuing out of Land, and purchaſe part of the Land, the whole Rent is extinct, and ſhall not be apportioned, but by agreement of the parties it may be received again: So if I enter upon part of the Land, the Rent ſhall be ſuſpended, and not apportioned. *Coo. ſuper Litt. fol.* 147. *Deſſ. lib.* 2 *cap.* 16. 7 *H.* 6. 26. *Br.* 3.

If there be Lord and Tenant of twenty acres of land by fealty, and twenty ſhillings Rent: If the Tenant make a gift in tayle, a leaſe for life or years, of parcell thereof to the Lord; In this caſe the Rent ſhal not be apportioned but is all ſuſpended: But if the Lord purchaſe part in Fee of the Tenant, the Rent ſhall be apportioned. *Coo. ſuper Litt.* 148.

If the Leſſor enter upon part of the Land of his Leſſee for life or years, and diſſeiſe or out him, the Rent is ſuſpended for the whole, and ſhall not be apportioned for any part. 4 *H.* 7. 6. *Coo. ſuper Litt.* 148.

If one have a Rent charge out of twelve acres, and releaſe the Rent out of one of the acres, the Rent ſhall not be apportioned and be chargeable upon the reſt. 34 *Aſſ. p.* 15.

If a Tenant infeoff his Lord and another in fee, the Rent ſhall not be apportioned, but is all extinct. 7 *H.* 6. 3.

If one hold his land of his Lord by the Service, to render to the Lord yearly at ſuch a Feaſt a horſe, a golden ſpurr, a Clove, a Gillyflower. If in this caſe the Lord purchaſe parcell of the Land, the whole Service is gone, and there ſhall be no apportionment: And ſo alſo is the Law, where parcell of the Land held by ſuch ſuch entire ſervice come to the Lord by deſcent, there ſhall be no apportionment; for in ſome caſes the ſervice doth remayn entire, and in ſome caſes it is extinct. *Coo. ſuper Litt. fol.* 149. *Coke* 8. 195.

If Tenants in tayle, or for life leaſe part of the land to others for years, there ſhall be an apportionment; but the Te-

nant in tayle, or Leſſee for life ſhall be ſtill charged with the whole Rent. 22 *Aſſ. p.* 52.

If one make a leaſe for years rendring Rent, and after the Leſſee aſſign over part of the thing leaſed, it ſeems here ſhall be no aportionment of the Rent. *Dyer f.* 4. & 5.

If one grant a Rent-charge out of two acres, and after the Grantee recovereth one of the acres by title paramount againſt the Grantor; In this caſe there ſhall be no Aportionment of the Rent: For if it were true, the whole Rent ſhall iſſue out of the other acre, if otherwiſe that it were fained, it is all extinct. *Doct: & Stud: lib: 2: c: 17: Coo: ſuper Litt:* 148:

If *A:* enfeoffe *B:* of one acre in fee on condition, and *B:* being ſeiſed of another acre in fee, grant a Rent out of both to the Feoffer, and *A:* re-enter for the Condition broken, here ſhall be no Aportionment. *Coo. ſuper Litt: f.* 148.

If one make a leaſe for years or life, rendring Rent at *Michaelmas*, or twelve days after; and before the laſt day of payment of the Rent the land is evicted from the Leſſee, in this caſe ſhall be no Aportionment, for Land ſhall never be aportioned in reſpect of time: And ſo it ſeems if a leaſe be for life of the Leſſee, on condition he ſhall pay 20 *l.* a yeare at *Michaelmas*, and he dye before *Michaelmas*, that the whole Rent ſhall not be aportioned: And ſo if a Tenant for life make a leaſe for years, rendring Rent at *Michaelmas*, and the Tenant for life dyeth, here the Rent ſhall not be aportioned, but is all loſt. *Coo:* 10. 128. *Opinio Bridgman Juſtic: Coo.* 10. 128.

If I let a flock of Sheep, or Houſes, or Land, to one for years, rendring Rent, and part of the Flock, Houſes, or Land be ſpoiled by the act of God, and default or negligence of the Leſſee together, here ſhall be no aportionment, but the whole rent ſhall continue ſtill. *Dyer* 56.

If three Joynt-tenants hold by an entire yearly Rent, as of a horſe, or of a grayn of Wheat, and the Tenant ceaſe by two years, and the Lord recover two parts of the Land againſt two of them, and the third do ſave his part by tendring his Rent, and giving ſurety, &c. In this caſe the Rent ſhall not be aportioned, but is all extinct. *F: N: B:* 169. *Coo. Juper Litt:* 149.

If

If a Lease be made on Condition that the Lessee shall not Alien the Land or any part of it, without the Licence of the Lessor, and he Licence him to Alien part; now the Condition is gone of the whole, and shall not be aportioned; and he may after Alien the rest without Licence. *Coo.*4. 120. *Coo:* 8. 79. *Coo Super Litt.* 215. *Of a Condition.*

If one Lease three Acres for years or life, rendring Rent, upon a Condition, and after sell the Reversion of one of these Acres. Now in this case, there shall be no Apportionment of the Condition, but it is destroyed in all: So also if the Lessee lett or surrender part of the Land to the Lessor: So if the Lessor enter upon part of the Land wrongfully, the Condition is not to be apportioned, but is suspended in all. *Coo.*4. 120. *Coo:* 5. 54. *Dyer* 308.

Si Deux Joyn-tenants ove garr sont perticon le garr. est destroyed per le com: ley: 6. rep. 12. b: sic s'ils sont perticon cas br. puis le statut. Ib. *Of a Warranty.*

If I have Common appurtenant to Land, and purchase part of the Land, the Common shall not be aportioned, but is all gone and extinct. *Coo.*4. 38. 8. 79. *Of a Common.*

If *A.* hath common of Pasture *Sans number* in twenty Acres of Land, and ten of those Acres descend to *A.* the Common shall not be aportioned, but doth remaine entire: And so it is of Common of Estovers, of Turbary, of Pischary, *&c. Coo. Super Litt.* 149.

If Lands be held by Suit of Court, and it descend to Daughters, the service shall not be devided, but the eldest shall doe all, and the rest shall contribute; And if the Lord purchase part of the Land the whole is extinct. 40. *Ed.* 3. *Br.* 22. *Of Suit of Court.*

If a Lease for years be made, rendring Rent at four dayes in the yeare, this Rent is not so entire, but it may be devided, and after the first day is past, the lessor may bring an Action of Debt for that quarters Rent. So also if one be to pay money by the condition of an Obligation or Recognizance, or by a Covenant at severall dayes, after a failer the first day the Obligation, Recognizance, or Covenant may be sued. But upon *Where a debt upon a Specialty or contract shal be demanded and where not.*

pon a ſingle Obligation, or a Contract or promiſe to pay money at ſeverall dayes, there no Action can be brought for the Debt, untill all the dayes be incurred, and the Debt ſhall not be appottioned. *Co.* 10 128 *Litt. fol.* 117 *F. N. B.* 267. *Dyer* 103.

If the Condition of an Obligation be to pay four pound at a day, and at the day the Obligor pay three pound, now the Condition ſhall not be divided, but the Obligation is all forfeit as if he had payed no part of it. 20 *H* 6 23 *Br.* 1.

If one promiſe me three ſhillings a week for his Dyet and Lodging, and I find him Dyet but not Lodging, this Debt ſhall not be divided, neither can I bring an action of Debt for the Dyet, by or upon this contract. 9 *Ed.* 4 1 *Br.* 2.

If one promiſe to ſerve me a year for ten pound, and before the year be expired, he depart out of my ſervice, or dye, or I diſcharge him, and he agree to it, now in this caſe the money ſhall not be divided, and therefore he hath no remedy for any part of his money, but if the money were to be paid quarterly, and he overlive the quarter, then he ſhall have the Quarteridge. If I have Land in the right of my Wife, and I ſell twenty trees upon that Land for twenty pound, and the Vendee cut ſome of them, and my Wife dye before the reſt be cut: now in this caſe the debt ſhall not be divided, neither can I ſue for any part of the twenty pound, but am without remedy 10 *Ed.* 4 18 10 *H.* 6 25 3 *Ed.* 4 6 *Br.* 25.

If a Leſſee covenant to pay the Rent, and after ſurrender part of the Land, or be evicted out of part by title *Paramount*, it ſeems the Rent ſhall not be apportioned; And that the whole muſt be paid ſtill. *Hil.* 7 *Jac. B. Regis.*

Contribution. It is where a burthen or charge is to be laid, or ſomwhat had from divers, and one ought to bear it as well as another, but if it is wholly laid upon one, in this caſe the Law (that delighteth in equity) will give him reliefe againſt the reſt. *Co.* 2 25. 21 *H.* 7 18 2.

If one bind him and his heirs by a ſpecialty, and dye and his Land deſcendes to divers heirs, there they ſhall be equally charged. So likewiſe upon a warranty where his Land doth

after

after go to divers persons, as heirs, they must all be vouched. *Coo. super Lito.* 143.

So if one have entred into a Statute and sold his land after to divers, and the Statute is extended upon one, he shall have Contribution against the rest. *Ipsa etenim leges cupiunt, ut jure regantur.*

If one hold three Mannors by Knights service of divers Lords all of equall valew, he cannot devise two Mannors and leave the third to descend, but he must leave a third part of each Mannor to descend for the benefit of every Lord. *Cook* 2. 25.

If a Lord of a Mannor would approve Common he cannot take it all out of one Village and leave it in another according to the Statute, but he must leave it in the same. *Coo.* 2. 25.

In these and such like cases therefore the Law willeth, that there shall be a contribution. And to give reliefe in some of these causes are the Writs of *Contributione facienda & de onerando pro rata portionis*, which Writs are of great affinity, the one seeming to be the *Genus* of the other.

The first being defined to be. *A Writ that lyeth in case where more are bound to one thing, and one is put to the whole burden.* And the last a Writ that lyeth where one is distrained for a Rent that ought to be paid by others proportionally with him, so that it seems the first doth lye in most or all cases where the latter doth lye, but not *e contrâ. Terms of the Law. F. N. B.* 234.

Contributione facienda.

De onerando pro rata portionis.

If tenants in common or Jony-tenants hold a Mill (*pro indiviso*) and equally take the profits thereof, the Mill falling to decay, and one or more of them refusing to contribute toward the reparation thereof, the rest shall have this Writ to compell them: *Fitz. N. B.* 162. *Marlb. cap.* 3.

Where the first lyeth or not, & where Contribution shall be made or not.

If there be three Coperceners of Land that have suit to the Lords Court, and the eldest performe the whole, then may shee have this Writ to compell the other two to a contribution of the Charge, or to one of them, if one only refuse. *Wens.*

Where one only suit is required for Land, and that Land being sold to divers, Suit is required of them all or some of them

them by diſtreſſe as intirely, as if all were ſtill in one, here he may have remedy againſt the reſt *Old N. B. fol.* 143.

If many are infeoffed of any Land, for which ſuit ought to be done, *&c.* now if they agree amongſt themſelves, that one of them ſhall make the ſuit, and the reſt ſhall be contributory, and the one doth the ſervice, and the reſt do refuſe to contribute, in this caſe he may have this Writ, and therein he muſt make mention of the agreement. And if there be no agreement, and one be charged for the reſt with all the ſervice, he may have this remedy. *Litt.* 162. *c.*

If a Charge come upon a hundred or Tithing, and it be laid upon one alone, it ſeems he may have his remedy by this Writ. *Fitz. Avarie* 191. *New terms of the Law.* 99. *b.*

If Dower of the tenant voucheth the heir in Ward to three ſeverall Lords, each of them ſhall be equally charged: *Co.* 3. 14. *a.*

If two, four or more men be ſeverally ſeiſed of Land, and they all joyne in a Recogniſance, in this caſe. If the Conuſee extend the Land of any of the Conuſers alone, he may have Contribution, for all ought to be equally charged, and not one alone without the reſt. *Idem Co.* 3. 14. *a.*

If Judgment be given againſt two diſſeiſors in Aſſiſe for the Land and damages, and one Diſſeiſor dyeth, the Execution ſhall not lye only on the ſurviving Diſſeiſor, but the heir and the Deiſſeiſor ſhall be equally charged, and Execution ought not to be Awarded againſt the ſurviving Diſſeiſor. *Idem Co.* 3. 13. *b.*

See more of this in Statute. *Numb.* Where the Land of one is charged by a Statute, he ſhall have Contribution againſt the reſt. But if two be bound in an Obligation, and one of them be charged with the whole, the other ſhall not have Contribution, unleſſe it be by ſpeciall cuſtome as in *London. Old Book of Entries fol.* 261. 126.

If a man hold ten *Plow* and by Fealty, and twenty ſhillings Rent of the King, & he tenant let one Plow Land to one man, another to another in Fee, and ſo the reſidue to others, and the Kings Officers diſtrain one of them for all therein, now he may have this remedy againſt all the reſt. So if the Kings

tenant

tenant have aliened to divers, and hath ſome of the Land in his own hands, and he be diſtrained for all, if he did alien by the Kings Licence, he ſhall have remedy againſt the reſt. *F. N. B.* 235. *A.*

And if a man that holdeth one hundred Acres of Land ought to repaire a Bridge, by reaſon of his tenure of theſe one hundred Acres, now if he alien in Fee twenty of theſe Acres to one, and twenty to another man, and after one of them alone is diſtrained to repaire this Bridge, upon a Preſentment made of it; In this caſe he may have a ſpeciall Writ, directed to the Kings Officers, that they ſhall not diſtraine him, but according to the rate of the Land he hath: *Fitz. N. B.* 235. *B.*

Attaint.

IT is a Writt that is given to releive a man that is hurt by a falſe Verdict; As if in a civil cauſe after another be pleaded to iſſue, a Jury of twelve men, thereupon impannelled, give a verdict againſt their Evidence given unto them therein, ſhew themſelves to be partiall, and thereupon judgement is given, then the party that is hurt and greived by the Judgement may have this writ againſt the other party (whether he be Plaintiff or Defendant in the firſt ſuit) and againſt the Jurors or ſuch of them as be then living. And then it ſhall be tryed by twenty four ſufficient Gentlemen of the Countrey, whereof twelve at leaſt muſt be of the Hundred where the Land lieth, whether the Verdict be true or falſe after the ſame evidence was given which was given to the Petit Jury (for no more, nor no other evidence may be given to this laſt Jury then was given to the firſt) And if it be wel done, or ſo much as is wel, ſhal be affirmed. But howſoever if the grand Jury, newly choſen do affirm it, though it be falſe, the party hath no remedy. And if the twelve Jurors be found guilty, then Judgement ſhall be given that the firſt Judgement ſhall be revoked, and the party reſtored to what was given from him thereby; That the party for whom the firſt Verdict was given, ſhall be fined and impriſoned; That the Jurors for the firſt Verdict ſhall forfeit each of them twenty pounds a peece, if the matter were above forty pounds, if under then one pound: And then are they called Attainted, and accounted as perjured and defamed, and they

The tryall and proceedings therein.

for ever disabled to serve in any Jury, or give in evidence in any cause, in any Court of *Record* again; But if the petty Jury be acquitted by the Grand Jury; and they do adjudge as the first, then shall the Plaintiffe in the Attaint, not onely loose the Land and bee fined, imprisoned and ransomed at the Kings pleasure, but also pay damages to the parties molested, and although the matter be never so false yet is there no remedy after this in Chancery nor else where. *Cromp. Jur.* 49. And if it be the Plaintiffe in the first Action that brings the Attaint, and he have Restitution, then he hath his Title and Action as before. *Fortescue cap.* 26: *Bro.* 242. 18: *Ed.* 4. 9: *Bro. Attaynt in toto. Dyer* 202. *Old. N. B.* 111. *Fitz. N. B. Attaynt: Statute* 23. *H.* 8. 3. 15. *H.* 6. 8: *A. D.* 14 36, 5 *Ed.* 3. *cap.* 6. 28: *Ed.* 3. *cap.* 8. 3. *H.* 5. 5. 11: 11. *H.* 6. 4. 13: *E.* 2. *cap.* 18. *Kelw.* 130. *Dyer* 5. *f.* 37. *Dyer* 33. 173. 235. 301: 212. *Co. super Litt.* 294.

These Writts are seldome put in vre, for Gentlemen will hardly be drawn to appear to this end, and when they do, unlesse the corruption be very apparant, they will not attaint them, and if they do, the Judge is not willing to give sentence, but deferreth, and then if the parties agree or dye, the Attaint ceaseth.

This word hath also another signification, for when a Judgment is given against any man in treason or Fellony, then he is said to be Attaint, or Attainted. *For which see Attainder.*

What persons may have an Attaint, and where not, and against whom.

Any one that is hurt by the false Verdict whether he be party to the first Suit or not, may have this Writ, and if the Verdict were about a matter of Land, then this remedy runneth commonly with the Land, so that any party or privy shall have it. As an Heire, or Executor, or he in reversion on a Recovery against the tenant for life or years. *Dyer* 1. *Co.* 11. 5. 18. *Kelw.* 129. *Co.* 3 4. *Stat.* 91. *R.* 2. 3 *Co. super Litt.* 294.

If a Trespasse be done by divers, and one have pleaded to issue upon a Declaration against him, and the Jury upon the tryall have assessed unreasonable costs; the other trespassers may bring an Attaynt, for they be bound by those damages. *Co.* 11. 5. *F. N. B.* 10. *Co.* 10. 119.

If

If treſpaſſe be againſt two and damages exceſſive, they may joyn in Attaint. *Coo.* 1:43.

But ſuch a one as is neither party nor privy to the ſuit, may not have this Writ. Neither can the King or an informer have this Writ. *Kelw.* 119. *Plow:* 439: *Broo.* 479.

where it lieth and where not.

And this Writ lyeth againſt parties or privies, Heirs, Executors, and any other for the moſt part that hath the thing that was recovered by the firſt judgement. *Dyer* 201:

It lyeth in all reall, perſonall, and mixt Actions; in caſe where any materiall falſhood is found, though there be ſome truth found with it: As in reall Actions, wherein a Writ of Entry, the demand is of twenty Acres, when he ſhould have but ten, and the queſtion be about the quantity, and they find he diſſeiſed him of twenty Acres: if they find a man guilty of many treſpaſſes when he is guilty but of one, or give exceſſive damages in a treſpaſſe, or the like: But it lyeth not on a falſe verdict given upon an enqueſt of office: nor for any falſhood found, when the thing found is out of their charge and impertinent to the iſſue: Nor upon any falſhood in a Writ of right, nor upon any thing found in a *Quare impedit de plenitudine ex cujus preſentatione, ſi tempus ſemeſtre tranſierit*, and about the valew of the Church by the year. *Coo:* 644. *Weſtm.* 1. 37. 1 *Ed.* 3. *cap.* 6. 28. *Ed.* 3: 8: *Dyer* 30. *Coo:* 11: 6: 10. 119. 11. 13: *Dyer:* 134: *Kelw.* 119:

Attaint lieth after the death of many of the petty Jury. 2. *H:* 4: 18. *a.* 16. *Ed.* 3. *Judgement:* 109.

Attaint lyeth not where Judges increaſe damages for the ſame. 3. *H.* 4. 4. *a.*

Attaint lyeth not upon an enqueſt, awarded to enquire of waſt. 7. *H:* 6: 38:

Pleas in Attaint.

There be divers pleas may be pleaded to this Writ, as a Releaſe, Arbitrement, Accord, and the like. Alſo that all the Jurors be dead but one: But one cannot plead another Attaint depending Joynt-tenency, or that the Plaintiffe is a Feme Covert, *Nontenure* is no plea for the firſt tennant, but if he enfeoffe a ſtranger, the ſtranger may plead it. *Coo.* 6. 44. *Dyer* 5. 75. *Broo.* 8. 11.

Attorney.

AN Attorney is a ſubſtitute or ſervant that is ſet or appointed in the turn, ſteed, or place of another, to do any buſineſſe for him: And he is of two ſorts. 1. Publique, and by Record, as are the conſtant and generall Attorneys at Law, in the Courts of Record. *Qui vicem gerit Clientis apud judicem*, whoſe warrant from his Maſter is *Ponit loco ſuo talem Attornatum ſuum.* He alſo is generall or Speciall. And the other is an Attorney that is private or by Deed, is ſuch a one as is made and appointed now and then for any particular buſineſſe, and upon any ſpeciall occaſion, who are ſo then only at that time, and in that thing. And in both theſe caſes when any thing is done by another as an Attorney, it is as if he did it by himſelfe: *Qui per alterum facit per ſeipſum facit. Coo. ſuper Litt. fol* 51. 52. *ſtat.* 7. *R.* 2. *cap.* 14. 7. *H.* 4. *cap.* 13.

Warrant of a publique Attorney.

The making & office of a private Attorney.

The private Attorney is commonly made and appointed by Letters or a Deed of Attorney, which is uſually called a Warrant of Attorney, which is a writing or inſtrument, authorizing the Attorney to do that for him, that doth make him his Attorney that he would have him to do. And their duty then is to purſue their Authority, from which if they vary, they make all the doe void and of no effect; for which *See Authority et infra.*

Warrant of a private Attorney.

The publick Attorney is to be made, appointed, and ſworn, by the Judges of the Courts wherein they be Attorneys, and they ought to chooſe and appoint none but men of learning and virtue, and ſuch as have been brought up in the ſame Court, or otherwiſe well practiſed in ſoliciting cauſes, and have approved themſelves able and honeſt therein, and for miſdemeanours they may remove, or otherwiſe puniſh them by their diſcretion. And then he is choſen by the Client, who makes his choice amongſt the Attorneys made by the Court, of which he will, and he may make his Attorney in Generall, for all matters to do and receive for him, or ſpeciall in one or ſome particular matters or things. *Statutes.* 4. *H.* 4. 18. 3. *Jac.* 7. *ſtat.* 7. *R.* 2. *cap.* 14. 7. *H.* 4. *cap.* 13.

By

By the common Law, all that were commanded to appear by the Kings Writ, were to appear in perſon: and then after appearance the Judges were uſed to allow them an Attorny; But if the Judges and Court were not ſuch as did not hold plea by Writ, they could not allow him without a Writ of *Attornato faciendo*: And the Juſtices in Courts of Record and elſe, would not ſuffer any to appear by Attorny, whether he were Plaintiff or Defendant. *Coo:* 8.56 *F. N. B.* 26 27. *Stat:* 20. *H.* 3.10.

Where and in what caſes one may have and retain a publick Attorny, and where not without a Writ out of the Chancery, or other allowance.

But at this day in moſt caſes where one doth ſue, or is ſued, he may make his Attorny without Writ of allowance from the King; as in Debt, Treſpaſs, Formedon, Account, Appeal of Murther, or death, in Suits in a Hundred, Tithing, County, Wapentage, or Court of the Lord: In a Plea to the return of a Reſcous by the Sheriff. *Dyer* 361: 5 *H:* 4. 8. *Glou: cap:* 3. *Merton capio, Weſt:* 2. *cap:* 10. 3 *H:* 7. *cap:* 1. *Dyer* 212.

In an Information or Suit upon a penall ſtatute, the Defendant being a Denizen may appear by Attorny of the Court, and ſhall not be compelled to put in Bayl. *Dyer* 346. 9. *ſtat:* 29. *Eli. cap.* 5.

In a Writ of Aſſiſe, Attaint, *& juris utrum*, after the Tenants have once appeared, he may make his Attorny to ſue for him if he will. *Stat.* 3: *Ed.* 1. *cap:* 41:

If any perſon be outlawed or waived, and is ſo impotent as he is not able to come in perſon to reverſe it, this being examined and found by the Judges, they may in their diſcretion allow him an Attorny; but not in the caſe of a Writ of *Capias ad ſatisfaciendum*. *Stat.* 7. *H.* 4 *cap.* 13.

In Pleas of Treſpaſs in the County-court, where an Appeal lyeth not, the Defendant may make an Attorny: *Stat.* 6: *Ed.* 1. *cap.* 8.

Any of the Petit Jury, Defendants in Attaint may appear and anſwer by Attorny. *Stat.* 23. *H.* 8. *cap:* 13.

But in a *Præmunire* the party may not appear by Attorny, without a ſpeciall Writ, notwithſtanding he be a Lord of the Parliament. 14 *H.* 4. 14. 9 *Ed.* 4. 2.

It ſeems that by this writ which is called *Attornato faciendo*, the

the King may command the Iustices to allow an Attorny to the Party [illegible]ntiff, or Defendant, in any Action or Cause, & the Iu[illegible] must allow him, as in a *Quid juris clamat* against a woman great with Child, or any impotent person, or in Prison, the Defendants may have a Writ to allow of an Attorny directed to the Judge. *F. N. B.* 25. *l. Dyer* 175. *Dyer* 135. *p.* 15.

By a writ out of the Chancery, or other allowance.

They which shall depart the Realm with the Kings licence, upon request to the Chancellor, he with advice of the Iustices may grant to them to make their generall Attornies to make answer, do and receive for them in any case or matter. *Stat.* 7. *R.* 2. *cap.* 14.

Every free man which oweth Suit to the County, Tithings, Hundred, and Wapentage, or to the Court of his Lord, may freely make his Attorny to do those Suits for him: And this must be allowed him upon a Writ of *Attornato faciendo. Stat.* 20. *H.* 3. *cap.* 10. *Fitz. Attorny.* 106. *F. N. B.* 156.

But in Writs of Entry and Right, the Iustices will not admit of of any Attorny on the Tenants side, unless he come in, and acknowledge him before some Iustice, or have a Writ out of the Chancery to testifie it. *F. N. B.* 26.

And a *Retraxit* cannot be entred in a Court by an Attorny, but the party must appear in person and do it: *Coo.* 8. 58.

Wher and what things may bee done by Attorny.

Most things that a man may do by himself he may do by another, as make a Feoffment or Lease, or the like, make livery of Seison, entry, claim, demand of Rent, or the like, or pay mony: One may receive mony, take livery of Seison, take a Deed, take a Copyhold Estate by an Attorny; Also one may revoke an Administration, Surrender a Copyhold Estate, sue for Debts and such like by Attorny. *Coo.* 9. 75. *Dyer* 283. *Bro.* 89. *Coo. super Lit. & Lit Sect.* 153. 14 H. 4. 1.

What by a naked authority cannot be done by an Attorny.

But if one have a naked authority only, coupled with a confidence, as Executors that have power to sell land have, he cannot do this by Deputy or Attorny: So if one have only a particular power and authority in respect of some speciall interest; as if there be Tenant for life the Remainder in tayl, and the Tenant for life hath power to make a Lease for one [illegible] years; this cannot be done by Attorny: So if

there

there be a speciall custome in a Manner that the Tenants may surrender to any two of the Tenants out of Court, this cannot be done by Attorny, unless the custome will warrant it. *Co.9.75. Co.9.75. Co.9.76.*

Also there be some personall things that cannot be done by Attorny, but must be done by ones self as the doing of Homage, Fealty, Suit of Court, or the like. 7 H.4.19. *Co. super Lit. Co.9.75.* *What personall things cannot be done by Attorny.*

None but such as are honest and skilfull, and have been accustomed to sollicite, or have been trained up in the practise of the Courts where they are to be Attornies, ought to be admitted by the Judges into that Office; And any one of those Attornies that are allowed by the Court, may be Attorny for his Client, whom the Client will choose. *Stat.4.H.4. cap:18. 3 Jac. cap:7.*

No Steward, Bayliff, or Minister of Lords of Franchises which have returns of Writs shall be Attorny within the Franchise or Bayliwick in any Plea wherof he is or shall be Officer or Minister. 4 *H.4.cap:19*

Any person almost may be a private Attorny, or do a thing for another, yea, such as might not do such a thing for themselves; as an Infant, Feme, Covert, person Attaint, Excommunicat, Outlawed, a Villain, an Alien: A Feme Covert may be an Attorny to deliver Seison to her Husband *& sic e contra*; And he in Remainder may be an Attorny to deliver Seison to the Lessee for life. *Coo. super Lit. fol.52.* *Private.*

They must demean themselves honestly and justly according to their Office and Oath, not moving nor exciting men to Suits, especially fortein and untrue ones, for small Trespasses and little offences and smal debts, whose Actions are triable in Courts baron. *Stat.4.H.4.18. Stat.3. Jac.7.39 H.6.cap.7.* *The duty and office of an Attorny.*

If he have given any Fee to any Serjeant or Councellor at Law, or any sum of money to Clerk or Officer, in any Court of Record at *Westminster* for Copies, he must have a Ticket subscribed with the hand and name of the same Serjeant, Councellor, Clerk, or Officer, witnessing how much he hath received, and at what time; And he must give a true Bill to his Client, or some for him, of all other charges concerning *Publique.*

the

the Suits, which they have for them subscribed with his own hand and name, before such time as he shall charge his Client with any of these same Fees or Charges. *Stat.* 3. *Jac.* 7.

He must enter his Warrant of Attorny on Record, the same Tearm the *Exigent* is awarded, under pain of forty shillings for every time! And the same Tearm he pleads to issue being for the Debt, or before, or else he is to forfeit ten pounds, and be further punished by the discretion of the Judges of the Court. *Stat:* 18. *H.* 6. 9 32 *H.* 8. *cap.* 30. 18 *Eliz: cap.* 13.

And they must not make any Suit in a forren County, nor willingly begin untrue and forren Suits. 39 *H.* 6. *cap. vltimo.*

They must not willingly delay their Clients Suits for gains, nor demand in their Bills any other sums of mony or allowance on his Accounts of any mony which he hath not layd out or disbursed; and if he do, his Client may have an Action against him, and shall recover treble damages, and the Attorny shall be put out of his Office for ever. *Stat:* 3. *Jac.* 7.

They must not admit any other to follow any Suit in their name, if they do, each of them, the Attorney and Sollicitor forfeit twenty pounds a peece, and the Attorny is to be put out of his Office for ever. *Stat:* 3. *Jac.* 7.

They must not be Under-sheriffs, Sheriffs Clerks, nor Receivers, nor Sheriffs Bayliffs whilst they be Attornies; and therfore if they take upon them any such Office, they must cease that while and discontinue the practise of an Attorny. *Stat:* 1. *H.* 5. 4.

Private. If a private Attorny do any thing, he must do it in the name of his Master for whom he doth it, and not in his own name, as if he have power to make Leases for years, it must be done in his name from whom he hath his power, unless there be some necessity to the contrary; As where an Executor hath power to sell Lands, they must do it in their own names, or it be in some speciall case, as where the Authority is so given, that he may do it by himself or a Deputy; but if the Authority be indefinite, and he do the thing in his own name, all is void that he doth. *Coo:* 9. 76. *Curia Underhills Cas: M.* 7. *Jac: B. Regis.*

Also

Also such Attornies must take care to pursue the Authority given them, expressed by the Deed and implyed by the Law. *Coo: lib: Instit: 1 partea, fol: 52.*

He may bring an action of Debt for the charges expended and his fees against his Client, or if he be dead against his Executor or Administrator, but he must then first give a note of the charges to his Client in manner as is above set forth. *Stat. 3. Jac. 7.* — *Th: power and authority. Publick.*

They may not meddle in the Sheriffs Office, and execute the Office, or practise as Attornies at one time. *Stat: 1. H. 5. 4.*

Such an Attorny cannot do more then his Master *Derivativa potestas non potest esse major primitiva.* And therfore the Attorny of one that is disseised, cannot make a claim of from the Land, if the Disseisee himself durst to have gone to the Land; The Bayliff of a Disseisor shall not say, that the Plaintiff never had any thing in the Land, for the Master himself might not say so. *24 Ass. p. 4. 2 Ed: 4. 16.* — *Private.*

The Warrant for the publick Attorny is *ponit loco sua talem Attornatum suum*; And this ought to be entred carefully by the Attorny: See the Statutes *supra el stat* 18 H: 6. *cap:* 9. *el* 32 *H.* 8. *cap:* 30. — *Warrant of Attorny. Publick.*

The Husband may make an Attorny for his wife and she cannot disavow him. *33 H: 6. 43.*

The Warrant of the privat Attorny is made by an Instrument or Writing *Ut Supra.* — *Private.*

The principall in an Obligation may give a warrant of Attorny for the rest for appearance; and this is as good as if the rest did give warrant for themselves. *Dyer 361.*

It is a Writ lying where one is bound in a statute Merchant Staple, or Recognizance or where judgment is given only for debt or damages, or the party in execution, and he hath a release or some other sufficient discharge for all or part of the duty, but hath no day in Court to plead it, nor means to make use of it, then he may have this Writ to relieve himself. *Cok. super Lit: 290 Dyer 56. Finches case 14. Fitz: 23.* — *Audita Querela.*

And this somtimes is to be brought against the Prosecutor himself, and somtimes against him and others that ought to bear part of the burthen with him. *Kelw: 25. Br: 38.*

The Proces herein.

If it be brought before execution by the party or his Heir or Executor, the party may have a *Supersedeas* to stay execution upon a Surmise of good cause for the *Audita Querela*, and upon bayl given to prosecute and stand to the Judgment of the Court: But when the party is in Prison it seems there is no bail put in till the Conusee answer in the *Audita Querela*: But after execution done it seems no *Supersedeas* lyeth, and the Proces besides are before Execution, a *Venire facias* with an *Alias*, and then if he come not in, it seems that the party that is in prison upon motion may be discharged, and a *Distringas*; and upon a default after appearance, and a plea pleaded, a *Distringas ad audiendum Judicium*, for by such default Judgment shall be given against him; And after Execution the Proces is a *Scire facias*, when the party is in prison on a *Cap: sat:* but when he cometh in *Gratis contra. Dyer* 339. 22 *H.* 6. 56. 2 *H.* 7. 12. 25 *H.* 6. 34. 43 *Ed.* 3. 29. 12 H. 4. 6. 15. 13 *Ed.* 4. 5. *Fitz.* 5, 6, 7.

It seems also that a stranger, as he that is a Purchasor of Land of a Cognizon of a statute, shall not have a *Supersedeas*, *See Fitz.* 8, 19.

And if one Purchasor sue to have Contribution of another, and that other have a discharge by release, a *Scire facias* shall go against the Cognizor that made the release, to try that Deed, *Fitz.* 19.

And in case where a man puts in Bayl, he shall not be discharged of his Bayl, but must continue it, untill the Suit by the *Audita Querela* be determined, for though the Plaintiff present not after the appearance of the Debt, yet the party must continue in prison or stand upon Bayl, *Fitz. Aud: Qu.* 2.

If a man be Non-suit in one *Audita Querela*, yet he may have another; but he shall have no *Supersedeas* to stay execution in the second, as he may in the first, *Fitz.* 11,

Against whom it lyeth.

This Writ lyeth against the Ter-tenant, without naming him *Partie*, or *Privie*, *F. N. B.* 104. *c*, 12 H. 4. 16,

If an Obligee have Judgment against an Heir of the Obligor, and his Land in extent, and the Obligee assign his Estate to a stranger, and after the Heir get a Release from the Obligee of the Judgment, he may have this Writ against the As-

signee. *Adjudg. Flower & Elgars case, pag. 7. Car. B. R. Co. 4. 30. 3. 44.*

In all cases where this remedy is given, there are these three Incidents in the case.

In what case this writ lyeth to avoid a judgment or Execution.

1 There is a charge and purthen come, or coming upon him that is to have it.

2 It is such as by Law he ought to be discharged of in all or in part.

3 It is in such a case where he hath no other remedy to relieve himself. As in all these examples following. (*a*) If a Judgment be against me, or Judgment and Execution, and the Plaintiff make me a Release in Fact, and I be released in Law, so as the same or any part of it is released, and yet he sueth Execution: (*b*) So if a Widow of a Copy-holder in fee that claimeth Dower by the custom of a Mannor, recover the same in the Lords Court, and fifty pounds in damages, where in truth there is no such custome, and the recovery is erroneous; the party grieved may have this remedy to prevent Execution, and to be restored to his damages if they be taken. (*c*) So if Executors have sued and recovered by Judgment, after the Testament is revoked and annulled, in this case the party against whom the Judgment is, may get it certified by the Bishop, and then have an *Audita Querela* against the Executors. (*d*) So if one be in Execution, and the Sheriffe or the Plaintiff deliver him out, and set him at liberty, and after take and imprison him again, he may have this remedy; for by this the Debt is discharged. (*e*) So if one have a Judgment against a Sheriff upon an Escape, and after the first Judgment, from the Execution whereof the Escape was, is reversed for Error, the Sheriff may have relief by this Writ; but till it be reversed, though there be action, he cannot: So if the party be taken after the Judgment reversed: (*f*) So if in a *Detinue* for a Statute, the Defendant prays Garnishment, and the Plaintiff recover against the Garnishee by an erroneous Judgment, and thereupon the Defendant deliver the Statute to the Plaintiff, and be hath Execution after the Garnishee reverse the Judgment; it seems though Execution cannot be avoyded, yet the party may have this Writ: (*g*)

So if one have a Judgment against two joynt-trespassors, and one is taken, and he is satisfied by him, and after sue to have Execution of the other, he may be relieved by this Writ. (a) 36 H 6. 24. *Plow.* 72. *Dyer* 286. 20 H 7. 30. *Coo.* 8. 152. *Dyer* 50. (b) *Coo.* 4. 30. (c) *Coo.* 8. 144. *Dyer* 203. p. 73. *id. Coo.* 8. 21. (d) *Cook.* 8. 142. (e) *Coo.* 5. 90. (f) *Trin.* 3 *Jac: R. Regis.*

So if one have Judgment against two, and one is taken in Execution, and released or discharged by the party, the other shall have the advantage thereof. *Monk against Brown*, p. 40. *L. Com. B.*

If he that is in Execution purchase a Mannor, to which the Plaintiff is a Villayn regardant, wherein there is a discharge in Law, he may have this Writ. *Fitz.* 19.

If an Obligee have a Judgment and Land extended of the Heyr, and assign it over, and after the Assignment release to the Heyre; in this case he may have this remedy against the Assignee. *Flowers Case.* p. 7. *Car. B: R: Adjudge, M.* 36. & 37 *Ed:* 2. *Coo. B.*

If the Conusee of a Statute or Recognizance purchase part of the Land the Conuzor had at the time or after, and another another part, and the Conusee sue the Execution on the other purchasor, he shall have this Writ to discharge him altogether, for in this case he shall not have contribution, or any part of him. *Charnock*, versus Sir *Thomas Gerrard.*

To avoid a Statute or Recognizance.

If after the *Scire Facias* sued upon the Statute, the Conusor get a release from the Conusee of all or part of the debt, and yet he go on to sue Execution, the Conusor may have this remedy; for if it be before the *Scire Facias* sued, that he had the release, he might have pleaded it. *Finch* 114. *Dyer* 50. p. 6.

If one enter into a Statute that hath some defect in him, and is not good, and yet the Conusee sue Execution, the Conusor hath this remedy: or the same be voydable by some Law, as if the same were made upon a usurious contract, or the like: Or there were a Defeasance upon it, which have been kept, and he notwithstanding hath sued Execution upon it:

Or

Or the Statute were delivered up (which is a release in Law) and the Conusee happen to come by him again, and sue upon him. *Dyer* 35. *Corsett* verf. Sir *Rowland Lacy*, *P.* 7. *Jac. B. Regis*, *Dyer* 297. *Br. Cro.* 31. 43 *Ass.* p. 18. *Br.* 29. 22 *Ass.* p. 44.

If the Conusor after Execution tender the money due upon the Statute to the Conusee, and he refuse it: or part were payd at the day, and he tender the rest in Court. *Fitz.* 4. *& in tota.*

If a Conusee or a Statute after Execution of body and land purchase parcell of the land of the Cognizor, or part of it descend to him, he may have this Writ to discharge his body of the Execution. *Plow.* 72.

If the Statute were delivered to a stranger to keep till certain condition, and he deliver him the Conusee; or he recover him by covin from him before the Conditions performed, he may have this Writ. *Fitz.* 15, 16.

If the Statute were entred in *per duress*, it seems by this it may be avoyded by an *Audita Querela*. *Fitz.* 927.

If one bind himself and his Heyrs by an *Especialty* and the party Obligee sue the Heyrs, and recover of them, and then after sue the Executors for the same cause; or *E converso* after he hath recovered against the Executors, sue the Heyrs, the Heyr or Executor may have this remedy, for he cannot plead it in barr: So if a Lessee covenant for him and his Assigns to repayr the houses, or otherwise: and after he hath assigned away his estate, he remayns lyable to an action of Covenant still, so as the Lessor may sue either; if he sue and recover against one, and then sue the other, he may have this remedy. *Plow.* 439. *Dyer*: *Bro.* 74. *To prevent a Judgment.*

If divers be bound by an Obligation or other Especialty, *conjunctim & divisim*, and the *Obligee* hath Judgment & Execution, and is satisfied the debt of one, and yet after sue another, now this other in this case may be relieved by this means. *Cro.* 5. 87.

So if in the interim between the Verdict and Judgment, the parties have put themselves into *Arbitrement* for the suit, or the Defendant hath gotten a release from the Plaintiff, and yet

yet the Plaintiff sueth Execution notwithstanding, for after the verdict he cannot plead it; but there it seems Judgment must be given before the Writ brought. 21 *H.* 7. 33. 11 *H.* 7. 10. *Fitz.* 7. 13.

So if one have had once Judgment and Execution for a thing, and then sue for the same cause, and recover againe. *Br.* 25. 9 *Ed.* 4. 50.

So if one take any goods from me by any delivery, and another take them from him; if one of us sue him, and recover for them (as we may both) and then the other sue, he shall be relieved by his. 5 *H.* 7. 15. *Dyer* 232.

For Nonage. If an Infant have entred into a Statute, he may avoyd it whiles he is in his minority by this means, but after he cannot: and the course to avoyd it is, when hee is in prison, for some of his Friends, to have this Writ to the Justices, and thereupon a Writ to the Sheriff to bring the Infant into the Court to be seen by the Judges; and then if they adjudg him within age, he shall be discharged out of prison, after process sent to warne the Conusee to come into the Court. *Fitz.* 26.

To have contributions. If one alone be charged, or about to be charged upon a Judgment, Statute, or Recognizance, and others ought to contribute, or beare part of the burthen, he may have reliefe by this Writ. (*a*) As if one enter into a Statute, and after sell his Land to divers purchasors: (*b*) Or a Judgment be had against a man, who doth leave his Land to divers Heyrs: Or one bynd him and his Heyrs by an Especialty, and leave his Land to descend to divers Heyrs: If one of the Purchasors in the first case, or one of the Heyrs in the last cases be charged alone, he may have this writ against the rest. And if any one of them have a Release, or other good discharge, this (as it seems) will discharge all the rest. See more in *Contribution & Statute.* (*a*) 48 *Ed.* 3. 5. *Fitz.* 38. *Cor.* 3. 44. 12 *Cor.* 6. 13. *Fitz.* 3 *An. Querela.*

Where not. If one have such a release of the Judgment, or Duty, as by Law is not sufficient to barr the Execution; in this case he shall have no benefit by this Writ. The same law is if it be to discharge a Statute. *Bro.* 37.

If

If one have good matter of discharge, and have a day and time to plead it in Barr, and do not, as when a *Scire facias* is sued out upon a Judgment, and the party have then a release or other matter of discharge, and do not plead it, now he shall not afterwards have any relief by this Writ; But if he had no warning of the *Scire facias*, then he may have this Writ, as when the Sheriff returns him *Nichil*. *Finch.* 314, *Fitz.* 25. *To avoid a Judgment or Execution.*

If a Prisoner escape against the will of the Sheriff and party, and the Sheriff take him again, he cannot have this writ, for the taking is lawfull. *Coo.* 3. 448, 141.

If one have a Judgment against a Sheriff upon an escape, and there be errour in the proceeding of the Suit wherein the Judgment is, but the Judgment is not reversed, yet the party can have no remedy by this Writ, untill the Judgment be reversed for error. *Coo.* 8. 142.

If one be outlawed after Judgment, and imprisonment upon a *Capias Utlagatum*, and the Sheriff doth let him goe at liberty, and the Plaintiff taketh out another *Capias utlagat:* against him, upon which the Sheriff doth return *non est inventus*, and the Defendant finds Error in the *Exigent*, upon which by sentence of the Court it is annulled; After the Plaintiff takes Execution on the first Judgment, in this case the party cannot have this writ: But if the *Exigent* had been well awarded, *Contra*. *Coo.* 8. 142.

If an Administration be granted to one, and he sueth a Debtor, and hath Judgment, and after another commonly sueth out an Administration to him and the first Administrator, and he alone releaseth to the Debtor, yet he shall not discharge himself by this Writ, for the Release was not good. *Dyer* 339. *Coo.* 6. 19.

If a Conusee purchase part of the Land of the Conusor before Execution, and after sue Execution, the Conusor shall have no remedy by this Writ, for the Statute is not hereby discharged. *Plow.* 72. *To avoid a Statute.*

If the Sheriffe in execution of a Statute deliver the lands of a stranger in Execution, as some of the Lands which were in the hands of the Cognizor the time the Statute was made, or after;

after: now he shall not have relief by this Writ, but by an Assise. *Fitz. Aud. Q. 6.*

If a Conusor of a Statute surmise, or that the Conusee and he have agreed, and that the Conusee hath delivered him the Statute for an acquittance, and because he hath him not to shew cancell'd, the Conusee or the Corporalis hath counterfeited the Statute, and so doth sue Execution, this is no good cause to maintain this Suit: But if he had the Statute to shew cancelled, then it seems this suit were mayntainable. *Fitz. 9. 10. 22.*

To prevent a Judgment. If one that is sued by the King get a charter of pardon, or any release in the mean betwixt the Verdict and the judgment, and after the Judgment is had, he cannot have relief by this Writ, but he may plead it after Judgment. *11 H. 7. 10.*

After a suit is begun, and so farr gone, as there is no time to plead, it seems no *Audita Querela* lyeth untill the Judgment be given. *Fitz. 13.*

For Nonage. If an Infant have entred into a Statute, and be sued upon it after he is of full age, he shall not then have any remedy by this Writ. *Dyer 231.*

To have contribution. If one after he hath entred into a Statute or a Recognizance doe convey away some of his Land to divers persons, but keep some in his hands, and the Conusee sue execution only upon the land that he hath in his hands against him, or his Heyr after his death, in this case neither he nor his Heyr shall have this Writ to have contribution of the purchasors: but if Execution had been sued upon one of the purchasors, he might have had him against the rest. *See more in Statute. Cro. 2. 91. Dyer 322.*

A Bargain

Averment.

A *Verment* (being taken largly) is any affirmation or denyal of som thing that doth not appear, which one doth offer to prove, which being allowed him, shall be put to tryall. Or (being taken more strictly) it is when one pleadeth a plea in abatement of a Writ, or barr of an Action, which he saith *paratus est verificare*. This offer in the conclusion of his plea is called an *Averment*: And in the first sense, it is sometimes allowed upon a Record, as *Fine* or *Recovery*, or the like, and a Deed, and against a Will, Certificate, and some Returnes of some Officers, but some of these things, the Law doth give such credit to, as that it will not suffer any thing to be denyed of or affirmed against it. *Terms Ley.*

For Averment in the last sense in the conclusion of a Plea. *See Dyer* 34 20 142 276 73 29 54 304 270 114 134 285. *Plow.* 431 455 484 488 *Co:* 11 10 8 161 *Plow.* 31 342.

Any thing that may stand together and agree with a Record, and doth not overthrow it, may be averred upon a Record: As if a Fine and an Inrollment be in one Tearm, one may averre the Inrollment to be after the Fine. So if a Fine levyed to *I.S.* the sonne of *W. S.* and *W.S.* hath two sonns of that name, an Averment may be had and taken, which sonne is tended: So if the Mannor of *S.* be granted by the Fine, and there be two Mannors of that name, an Averment may be which Mannor is intended: *Co:* 4 71 *Co:* 8 155 5 68:

If in any Action the Defendant get a *Supersedeas*, supposing himselfe to be a servant to a Master of the Chancery, the Plaintiffe may averre, that he is not his servant or not in his Servant in house: So if one get a protection, *quia moratur* may averre, that he is *Demurrant infra quatuor maria*. *Fitz.* 3:4.

An Averment lyeth and may be taken upon a Fine or Recovery for the uses thereof, both in such cases as wherein no uses are expressed, as also in such cases where uses are declared, but doubtfully and incertainly, in that case by an averment

there may be an explication, and a reconciliation of the Fine or Recovery, and Indentures to direct the use of it: *vide Uses Coo:2.75:*

If any Estate be made to a Woman Covert before or after her marriage by Fine or Recovery for her life, an averment may be taken and had, that it was for her Joynture: *vide Joynture. Dyer* 146. *Coo.* 4.4:

It seems an Averment shall be allowed and taken against a Verdict to prove him false. 20 *H.*7.11.

If a Recovery be pleaded upon a *non sum informatus*, or *nihil dicit*, in this case an Averment lyeth without shewing how: And if it be in a Recovery upon a Verdict it lyeth, but in that case he must shew how. *Green verſ: Wilcox M.*40 & 41 Q: *Coo B.*

Upon a Retorne

(*a*) Where the Retorne of an Officer is such as it is no definitive tryall of that thing whereof the Retorne is made as upon the Retorne of a *Rescous* by the Sheriff, an Averment doth lye against it, and it may be put to tryall again. (*b*) So if a Statute sued against Executors which have goods in another County, & there before the Sheriff it is found by Inquest that the Executors have goods, and thereupon a *Scire facias* goeth against them, in this case he may plead he hath no goods, for here in this case the party cannot have Attaint or Action of the case. (*a*) *Dyer* 212 *Westm.*2:*cap:*40 *stat:*1 *Ed* 3 3 (*b*) *Gibson & Brook Trin.*43: *Eliz:* 2.

So if the Retorne be such as may endanger a mans life, an Averment will lye against it. *Dyer* 348.

So if the Retorn be such as may endanger a mans Inheritance, one may have an Averment against it. *Dyer* 117.

Against the false Retorns of Bayliffs of franchises, which have full retorne of Writs, a man shall have averment, and recover against them, as well as against the Kings Sheriff: as well of to little issues returned, as in other cases, so that it hurt not the Lord nor his franchise: *Stat.*1.*Ed.*3.5.5 H 7.27.

Upon a Certificat.

Such a Certificate as is only to give information, and not by the course of the Common Law in the nature of a tryall, an averment will lye, and may be taken against, as against a Commission out of some Court, and a Certificat thereupon, as the Certificat

Certificat of Commissioners that affirme a man to be a Bankrupt: *Coo.* 7. 14. & 122.

Upon a Deed.

An Averment lyeth, and may be had upon a Deed to cleare the ambiguity of it, or to alter, qualifie, or abridge the operation of it, if there be any apt words in the Deed, whereupon to ground it: As if a Feoffement be to *A.* the sonne of *B.* and *B.* hath two sonns of that name: Or a grant be of the Mannor of *S.* and there be two Mannors of that name; an Averment lyeth and may be had, which sonn or which Mannor was intended, and it shall be tryed by the Countrey: *Coo.* 8. 155 5: 68. 43. *Ed.* 3. 16. *Clarke case: Record. Hill* 7. *Jac.*

An Averment of a consideration of a Deed, that is only *preter* the expresse consideration of the Deed, may be taken and had. As if there be no consideration expressed, but what the Law doth imply, there a consideration in *fait* may be averred. *Dyer* 3. 2. *F. N. B.* 206. *Crompt. Jur. f.* 62. *Coo.* 1 176. 11. 24. *Dyer* 146.

If an Estate be made to a Feme Covert before or after marriage, by Deed or Fine for her life, an Averment may be had and taken, that it was for her Joynture, though there be some other consideration expressed on the Deed or Fine: *vide Joynture. Coo.* 44.

Upon a Joynture.

If one make a Release by generall words first, and after couple them to speciall words, and restrain them all to one particular, an Averment may be had and taken, that the meaning was to release that particular only. *Coo.* 8. 155.

If a peece of Ground that anciently had another name, be now turned into tillage, and have gotten another name; and be granted by that name, an Averment may be had and taken, that it is all one. *Dyer* 37. 44.

Upon a Will or Administration.

An Averment may be had, and shall be allowed against, or upon a Will, for one may deny a Will, though it be under the Seal of the Court approved, and alleadge that a man dyed *intestate*, though there be an Executor named by such will, and put it to the tryall of the Countrey: So also may one do against letters of Administration, though they be under the Seal of the Court: *Coo.* 8. 31. 41. *Dyer* 294. *Plow.* 277.

And one may averre any thing upon a Will, that will ſtand with the words of the Will (though it be upon a deviſe for Land) for the clearing of the intent of the Teſtator. As if one have two ſons of one name, and ſuppoſing the eldeſt to be dead (having been long abſent) deviſe his Land to his ſonn in generall, and in truth his eldeſt is living, now in this caſe the youngeſt in pleading, or giving of evidence may averre it was intended to him and being proved by witneſſes ſhall have it. *Co.* 5. 68.

Upon a Court Roll.

An Averment ſhall be allowed and may be taken againſt all or any part of the Roll, or Record of a Court Baron, County, or Hundred Court, as, that there is no ſuch record, or that it is not ſo as it is certified, and this ſhall be tryed by the Countrey. 34. *H.* 6. 42. 9. *Ed.* 4. 4.

Againſt a Record of Court which commeth into the Kings Court, by a Writ of falſe Iudgement, in caſe where the party alleadged, that the Record is otherwiſe then the Court doth record, the Averment ſhall be received of the good Country, and of them which were preſent in Court, when the Record was made, if they do come with others of the Countrey by the Sheriffes returne, and if they come not, the Inqueſt ſhall be taken by the good Countrey. *Stat.* 1. *Ed.* 3. *cap.* 4.

Upon a Vouchee.

Becauſe the demandants in plea of Land have been often delayed, for that the tenants have vouched to warrant a dead man, againſt which the demandants might not be received to averre, that the Vouchee is dead; It is awarded from henceforth that if the tenant vouch to warrant a dead man, and the demandant will averre the vouchee is dead or there is none ſuch, their averement ſhall be received without delay: *Stat.* 14. *Ed.* 3. 18. *Fitz. Averment* 30. 33.

Where and in what caſe, and upon a Record.

No Averment ſhall be taken or allowed of any thing that is, *Contra*, or *Preter*, any thing that is in a Record. As if a Fine be levyed, *Sur. Grant & Render*, no other uſe ſhall be averred by word, but what is in the Fine. If it be levyed by a Feme Covert, no Averment will lye for her after her Husbands death, that ſhe did it by her Husbands compulſion, though it be true, neither ſhall ſhe have in that caſe any remedy in Chancery. 2. *rep.* 75. *a.* 76. *a. Plow.*

a Plow. 434. *Cro.* 10. 92. 21 *H.* 7. 24 *Dyer.* 311. *Dodr. & stu.* 15. 5. *Cromp. Jur.* 55.

If the Returne of an Officer be such as be a definitive tryall of the thing. *Vpon a Return.*

No Averment shall be taken or allowed upon the generall Returne of a Sheriff; as if he return, the Writ came so late, no deniall can be made of it. *Dyer* 348. 14.

No Averment lyeth against the Return of the Mayor, Aldermen and Sheriffs of *London*, upon a Writ of *Habeas Corpus* sent to them to bring in the body of one in their Prison to another Court. *Cro.* 8. 127. 128.

Such a Certificate as the Law appointeth as a definitive tryall of the thing certified; As the Certificate of the Ordinary of generall Bastardy, Excommunication. Loyalty of Matrimony, or that a parson will not pay his Tenth, *Iuxta formam statuti*, cannot be averred against, and therefore in this case, no averment shall be received. *Cro.* 7. 14. 9. 31. *Bro.* 332. *Vpon a Certificat.*

No Averment lyeth against a Certificat under the great Seal: As if in a *Quare impedit*, the King certifie the Justices that *I. H.* late Parson of *W.* was created Bishop of *E.* and so it doth belong to the King to present. 21 *Ed.* 3. 40. 33 *H.* 6. 18.

No Averment shall be received or allowed to alter abridge or qualifie any words in a Deed against the words themselves (*n*) As if a Feoffment be to one and his heirs. An Averment shall not be taken, that it was intended to the heirs of his body. (*k*) So if a Release be generall, an Averment shall not be allowed, that it was intended of some one particular. (*l*) And therfore also, No consideration that is contrary to the consideration expressed in the Deed, nor a use that is *contra* or *praeter*, the expresse uses in the Deed shall be averd. As if I give Goods by my Deed, and it is expressed they shall be to the use of my self, now an Averment shall not be received, that the Deed was delivered to another use, for if the Deed were so expressed, and another use expressed and declared upon the delivery of the Deed, this Declaration is void. So if there be (*d*) So if a Deed expresse a consideration, the *Vpon a Deed.*

Heir

Heir of him that made it shall not be received to averre, that there was no consideration given neither in Law nor conscience. (e) So if the Deed do mention the delivery to be in one place, no Averment shall be received or allowed that it was delivered in another place. (f) So if a Lease be made for life without impeachment of wast, the Remainder to another in Fee, he in Remainder shall not be admited to averre, that there was an agreement between them, the Lessee for life should do no voluntary wast. (g) So if one have an Obligation for money, no Averment by word shall be received to avoid this, unlesse it be in especiall cases. *See Paiment & Fait.* (a) *Coo.* 8:155: (b) *Coo.* 8.155. (c) *Coo:* 11: 176. 11. 24. 2. 76. (d) *Dyer* 169: *Crompt: Iur.* 9.52. 62. (e) *Plow.* 7. (f) *Mich.* 8. *Iac. per Curiam.* (g) *Doct. & stu. lib.* 1. *chap.* 12:

Where the Law accounteth a thing so uncertaine, as for incertainty it doth adjudge it void, there no averment shall be allowed or received to make it good. As if one give a Horse to one of the Sonns of *I.S:* and he hath divers sonnes, the gift cannot be made good by averment, that it was intended to such a sonne. So if a Deed be of Land to two, *et Heredibus*, this cannot be made good by Averment, for no such averment shall be received. *Coo.* 8: 155: 11. *Ed.* 4. 2. 24: *H.* 6. 15:

upon a will. No Averment lyeth, nor shall be admitted upon a Will of a Devise of Land, if any thing that cannot be gathered to be the mind of the Testator, out of the words of the Will alone, or out of the words, and testimony that agreeth with the words, for no Averment lyeth *Contra* or *preter*, the expre swords of such a Will. As if one devise Land to *A.* and the Heirs of his body, the Remaynder to *B.* and the heirs Males of his body, on condition that he or they, or any of them shall not alien, *&c.* No averment shall be taken to prove by witnesses, that it was the intent of the Testator, to include *A.* within this Condition in the words (He or they) and so to extend the Condition further then the Law would. So no averment shall be received on a Will, that it was to any other use then the Devisers: *Coo:* 5. 68: *Coo:* 4: 4.

upon common presumption. No Averment or prooff shall be allowed or received against common presumptions of Law, as against the intend-

men

ment of a Collaterall warranty. *Coo. Instit. Lit.* 373.

So when the Lord makes an acquittance of his Rent for the last day of payment, though many years Rent be behind, yet no Averment shall be received to that purpose. *Coo. Inst. Lit.* 373.

upon an award.

If the matter conveyned in the Award, and the matter conveyned in the submission, upon which the Arbitrator doth make an Award, do differ in words, or in circumstance, the parties to the Arbitrement shall not be received in a suit upon it, to averre it all one. *Dyer* 242. 52.

Against common reason.

No averment shall be allowed against common reason, as that Land doth belong to a messuage, and hath done so time out of mind. *Plow.* 179.

Where and in what case an averment is necessary, and where not.

If the Consee in a Recognizance grant to the Conusor by his Deed, Dated before the Recognisance, that if the Conusor performe certain conditions in the Indenture, the Recognizance to be void, now if the Conusor will make use of this, he must averre this Deed to be delivered after, or at the time of the Recognizance. *Perk. Sect.* 14.

An Executor of the grantee of a Rent, or Reversion expectant on an Estate for life, cannot avow his distresse without averment, that the Arrearages incurred after the death of the tenant for life. *&c. Adjudg.*

But where a thing is apparant in it selfe, or necessarily intendable, there it needs not to be averred. *Quod constat clare non debet verificari. Coo.* 11. 25. *Plow.* 8.

A generall averment of Coven or Fraud, without any particular setting down of the manner how, is sufficient: *Dyer* 146. *Plow.* 171.

They

Ancestors.

They are our fore-fathers or Predecessors that went before us, who in relation to them are called their Successors: But this word in the Law hath speciall relation to such a Successor as is an Heyr also to his Predecessor, & is especially applyed to Inheritances that descend from one man to another.

To what persons lands shall goe after the death of an Ancestor, & to whom not.

If lands be given to a man and the Heyrs of his body, who dyeth, having issue two sons, of which the eldest dyeth, having issue a daughter, this daughter shall inherit: So of lands in Fee-simple by descent. *Litt.*

If a man be seised of Land by purchase or descent, and have issue a Son and a Daughter by one venter, and a Son by another venter, and he dye; and the first Sonn dye, the Sister, not the other Brother shall have this. *Litt.*

If *A.* dye seised in fee, leaving issue *B.* his eldest sonne, and *C.* his younger sonne: *B.* take a Wife *D.* and have issue a Daughter, *O.* dyeth, and *B.* takes another Wife, and leave her great with Child, the Lord seiseth the Land and body of the Daughter, and granteth to one the custodie, which endoweth the second Wife of *B.* and after she is delivered of a Sonne, and the Lord seiseth him for his Ward, and the Son dyeth during his Minority: Now in this case all the two parts of the Land that was in the hands of the Lord shall come to *C.* and the third part the Wife of *B.* had in Dower shall go to the Daughter. 8 *Ass. Plow. 6. Brod. Discent. Pl.* 19.

If one by Will devise to *A.* his Wife his land in *Winchester*, where the custome is, that he that hath the first Estate by the Devise may not alien for his life, the Remaynder to *B.* his sonne for his life; the Remaynder *propinquioribus haeredibus de sanguine puerorum post mortem praedicti B.* and the Devisor dyed having issue *C.* an elder Son, and *M.* a Daughter, which had issue *E. C.* dyed without Issue. *A.* enter and dye seised, *B.* enter and alien, *M.* the Daughter dyeth, and *E.* her Daughter doth claym, *B.* dyeth without Issue: Now in this case the Heyr of the Devisor shall not have this.

If

If *A.* make a leaſe to *B.* for life, the Remaynder to the neareſt of blood, and he dye having iſſue two ſons, and the Eldeſt dye, having iſſue a ſonne, the other, not this ſon who is Heyr ſhall have it. *See more in Diſcent.*

As the caſe of *Diſcent* is divers, ſo according to the diverſity of caſes, there is a different remedy, for ſometimes the *Diſcent* is only of a Right, and ſometimes it is of a Right and a Poſſeſſion alſo: and in ſome caſes the *Diſcent* is to one ſingle Heyr, and ſometimes to many perſons that make one Heyr in Law: But in all caſes where another doth enter before the right Heyr, the Law doth give him that right hath, an action, which in this caſe is called an Action *Auncęſtrel*, which is ſayd to be ſuch an Action as is brought by the next Heyre when as a Stranger hath entred upon him after the dying ſeiſed of his Anceſtor. And is is either *Droiturell* (*i*) when a right only doth deſcend from the Anceſtor: or poſſeſſory (*i*) when a poſſeſſion doth alſo deſcend with the right: And for this there are divers Writs, as in the Examples following. *Finches ley f.* 92. *F.N.B.* 221.

The remedy for ſuch perſons to whom ſuch lands ought to come, when a ſtranger enters upon the land, before the entry of him who hath right after the death of his Anceſtor.

Action Auncęſtrell.

IT is a Writ which lyeth where land deſcendeth from the Grand-father to his Nephew, the Son or Daughter of the Son of the Grand-father, the Father being dead before any entry made by him, and one that hath no right abateth (*i*) entreth, then the Heyr may have againſt him this writ. *New tearms of Law.*

Aile.

IT is a writ that lyeth where Land deſcendeth from a great Grand-father, or great Grand-mother, and a ſtranger entreth firſt and keepeth out the Heyr, then he may have againſt him this Writ. *F.N.B.* 231.

Beſaile.

IT is a Writ, and lyeth where the great Grand-father, the Grand-fathers Father, or other Couſin dyeth ſeiſed in Feeſimple, and a ſtranger abateth (*i*) entreth into the Lands, then the Heyr may have againſt him, or his Heyr (if he be dead) or his Alienee, or againſt whomſoever after that cometh to the Lands. *Termes ley.*

Coſinage.

Mortdauncestor. IT is a Writ, and lyeth where the Father, Mother, Brother, Sister, Uncle, or Aunt dye seised of Land in Fee-simple, and a stranger entreth into it before the Heyr, then he may have this Writ. *Termes of the Law.*

Nuper obiit. IT is a Writ, and lyeth where a man hath many Heyrs, either Daughters that be parceners, or sons in gavel-kind, and dyeth seysed, and one entreth into all, and keepeth the other out; then in this case he or they that be kept out, may have this Writ against the Co-heyre that is in. *New terms of Law. 4 H. 7. 9.*

Rationabili parte. IT is a Writ, and lyeth where an Ancestor was once seysed, and made a lease for life, and dyeth, and after the Lessee for life dyeth, so that the Ancestor dyed not seysed of the possession, but of the reversion, and one of the Heyrs entreth into all, and keepeth out the rest, then he or they that are kept out may have this Writ. *Terms ley.*

Ancient Demesn. IT is a certain tenure or holding in the nature of Soeage, of divers Mannors in the Kingdom, that were in the hands of St. *Edward* the Confessor, and *William* the Conqueror, which are written in a Book lying in the Exchequer, which was made in the fourteenth year of *William* the Conqueror, contayning a survey of all the Mannors & Lands in the Kingdoms, which book is called *Dooms-day*, wherein all the Mannors which are written under the title of (*terra Regis*) which were then the Crown land, are *Ancient Demesn*, and the Tenants that hold of those Mannors are called Sokemans. *Terms ley Ancient Demesn.*

The Tenants that hold of these Mannors have many privileges: As,

1. They may not be impleaded out of their Mannor.

2. They are to be quit of payment of Toll within every Fayr and Market in the Kingdom for all they sell, and for all they buy, also for sustenance and husbandry.

3 They

3 They may not be impannelled in any Juries out of their Mannor for any of their lands of that Tenure.

4 They are to go quit for Postage, Murage, and Passage, from Tax and Tallage granted by Parliament, unless they be charged by speciall words, and from all payments to Knights of the Parliament. And these priviledges may be lost divers wayes. *Howes Annals f.* 118. *F: N: B:* 14. *Co. 9. Dyer* 8. 9 *H.* 4. 5. *Kelw.* 21. 49 *Ed.* 3. 8.

Burrough Englisb.

IT is a kind of tenure in the nature of Socage, whereby some Burroughs in the Kingdom do hold of the King or some other great Lord, paying a certain Rent only. *F: N: B: 6. Doct. & Stu. l. 1. c. 7. Termsley.*

These Burroughs have divers Customs; As

1 That the youngest sonne shall inherit his Fathers land.

2 That the Wife shall have all her Husbands Land for her Dowre.

3 That they may devise their Lands by Will. *Litt. Sect.* 162, 163. 166.

Gavelkind.

IT is a tenure, and holding of certayn Lands in *Kent*, which is in the nature of Socage, & the Tenants that hold by this tenure have divers priviledges which they had anciently, and held by composition made with *William* the Conqueror, when all the Kingdom besides was subdued, and they only held out, and would not yield, unlesse he would grant them to enjoy their Customes, which he at last did, and these they do still continue. *Termsley, Dyer* 157. *Camd. Brit.* pag. 239.

Their customes (amongst others) are,

1 That all the Heyrs males shall inherite.

2 That an Infant of fifteen yeares old may give or sell his Land.

3 That the Son shall inherit the Land, though the Father be attainted of felony.

4 That the Wife shall have a moyety of her Husbands land for her Dower.

5 That the Husband of a Wife that hath Land of this Te-

nure shall be Tenant by the curtesie of a moiety, though he have no Issue by his Wife.

6 That they may devise their Lands by Will.

7 That if there be no Heyrs males, the Land shall be divided amongst the Heyrs females. *Cambd. Brit. ut supra Stat.* 31. *H.* 8. *cap.* 3.

Gavelet. THis came from *Gavel-kind*, and it is a speciall and ancient kind of *Cessavit* used in *Kent*, where this custome of *Gabel-kind* is: By which the Tenant forfeits his Lands to the Lord of whom they were held, if he with-hold his services. *Fitz. Cessavit* 60. *Westm.* 2. *cap.* 21.

Monstravera-runt. IT is a Writ lying where the Lord distrayneth a Tenant in *Antient Demesn* for other services then are due, then they may have this Writ to prohibit them. *F. N. B.* 14, 15.

Vide Distresse: Notice.

Avowry. IT is where one doth distrayn another for Rent or other cause, and the party distrayned sueth a *Replevin* against the taker, then he must justifie and avow in his plea the lawfull taking of them, and shew why he took them, whether in his own right, or as Servant or Bayliff to another: And this is called *Avowry*. *Co.* 9. 135.

There be four manner of *Avowries* for Rents and Services: *viz. Super verum tenentem*, as in the case of Lord and Tenant.

2 *Super verum tenentem in forma predicta*: As where a lease for life, or gift in tayle, the Remaynder in Fee.

3 Upon one, as upon his Tenant by the Mannor omitting (*vnes*) As when the Lord hath a particular estate in the Seigniory: and so shall the Donor upon the Donee, and the Lessor upon the Lessee.

4 Upon the matter in the land, as within the Fee and Seigniory: As where the Tenant by Knights service maketh a lease for life reserving a Rent, and dye, his Heyr within age, the

the Guardian shall avow upon the Lessee, (s) *super materiam predictam in terris & tenementis prædictis ut infra feodum & dominium suum. Coo. idem*

At this day by the Stat. of 21 *H.* 8. *cap.* 19. the Lord may avow for taking a Distresse, as within the Lands held of him, and within his Fee and Seigniory without naming any person certain to be the Tenant; but in this case the Plaintiff in the *Replevin* or *second Deliverance*, shall have every answer that is good saving *Disclaimer*: But the Lord may still avow upon the person if he will at his election: And for a Rent charge, the party may avow, and not upon a person certayne by the Common Law. *Coo. super Litt.* 268. 312.

upon what person an avowry shall be made, & upon whom not.

If two parceners make partition, and give notice thereof to the Lord, he must avow upon them severally, and not upon one for the whole Rent. *Broo. cap.* 108.

If the Tenant alien his Land to another, and give the Lord notice of it, and tender him all the arrearages behind, the Lord cannot after avow upon him for any services; but till he hath given notice he may avow upon him for new services, & after notice for the Arrearages behind till notice. But if the Lord grant away his Reversion after the Alienation of the Tenant; or the Lord accept the Rent or service of the Feoffee, he hath no remedy for the Arrearages: Or if he will he may loose his Arrearages, and avow on the Feoffee: But if a Feoffor dye, and the Lord do after accept the Rent or Service of the Feoffee due in his time, yet he shall not loose his arrearages, because he is now compell'd to avow upon him. *Coo.* 3. 23. *& super Litt.* 268.

If the Tenant be disseised, and the Lord avow upon the Disseisor, the *Avowry* shall abate, and the Disseisor shall compell him to avow upon the *Disseisee*; but if he have accepted the Services of the Disseisor, *Contra. Coo. super Litt.* 268.

where seisin of more Rent then ought to be shall bind in an Avowry, and where not.

Replevin.

IT is where one man distrayneth anothers goods or chattels, then the party that is distrayned (upon giving security to the Sheriff or his Deputy, that he will pursue the Action and return the Beasts again, if the taking shall be adjudged lawfull)

fault) may have this writ to the Sheriff: Or if it be within a Franchise, the Sheriff by his warrant to the Bayliff of the Franchise, and hereby he shall have the goods or chattels restored again: And this the Sheriff is to do, either upon the Writ of *Replegiari facias*, which a man may sue out for that purpose, or without any writ *Ex officio* upon a playnt before him. For goods may be replieved two wayes, *viz.* by Writ, and that is by Common Law; or by Playnt, and that is by the Statute for the more speedy having again of the goods: And hereupon the Sheriff ought to take two kind of pledges, one by the Common Law, and they be *plegij de prosequendo*; and another by the Statute, and they be *plegij de returno habendo*. In the same manner also may a *Replevin* be made in any Court Baron, as well as in the County Courts, and in both at any time before the Court day. And this according to the plea maintained by the parties, groweth to be either a reall or personall plea: as if by his plea he claym the property, then is it personall: If the *Defendant* avow the taking for Rent or Services, then is it reall. And if the *Defendant* do claym a property in the goods or chattels, this must be decided before they can proceed any further: And if any thing touching the Free-hold come in question: As if the *Defendant* avow for Damage-Feasant, and the *Plaintiff* justifie by reason of a common of pasture, they can no further proceed in those Courts. The property must be tryed by the writ of *proprietate probanda, infra Termes leg. F. N. B. 68. Westm. 2. cap. 39. Cook. super Litt. 145. Marlb. cap. 21. Westm. 1. cap. 16, 17. Cook. super Litt. 161. F. N. B. 70. 4 H. 6. 30.*

If diseasmens cattell be taken, they may not joyne in a *Replevin*, but must have severall *Replevins*. *Cook. super Litt. 145.*

The Sheriff of every County must have four Deputies in every County to make these *Replevins*. *1 & 2 Ph. & Mar. cap. 10.*

The Sheriff may make *Replevin* of Beasts not only without but within a Liberty also, if the Bayliff of the Liberty will not. And if there be cause, he may take *posse comitatus* to make

make a *Replevin*. 3 *H.* 7. 4. a. *Marsh. cap.* 21.

The Sheriff or Bayliff that shall deliver cattell or goods, shall take pledges not only to prosecute, but also to return them, if return shall be awarded; and if he do not, he shall answer the price of the Beasts. *Westm.* 2. *cap.* 2.

If a Retorn be once awarded, and after another Retorn be awarded, the Distress shall remayn irreplegiable, there shall be no more *Replevin*.

Replevin. In what case this Replevin lyeth, or not.

Whosoever will have this remedy upon goods taken, must take heed that he be owner of the goods distrained at the time of the taking: For it is a rule (*a*) that the Plaintif in this case must have the generall and absolute, or at least the speciall property of the goods distrained at the time, or else his *Replevin* will not be maintainable: (*b*) and therefore it is a good plea in a *Replevin* to say that the Property was at that time in a stranger. *Coo. super Lit.* 145. *b.* (*a*) 6 *H.* 4. 2. 20 *H.* 6. 19. (*b*) 6 *H.* 4. 2. 27 *H* 8. 21. *a.*

If a man by his Deed grant a Rent with clause of distresse, and grant further that he shall keep the goods distrayned against gages and pledges (*i*) that they shall not be replieved untill the Rent be payd, yet this *Replevin* lyeth notwithstanding. 31 *Edw.* 3. *Gage deliverance* 5. *Cook. super Littleton*, 145. *b.*

If where the tryall is by playnt the party claime the property of the goods, and thereupon the Writ *de proprietate probanda* come forth, and thereupon it be found for the Plaintiff that was distrained, then the Sheriff may make *Replevin*, and deliver them; but if it be found for the other against the Plaintiff, yet may the Plaintiff have a Writ of *Replevin* to the Sheriff, and the Sheriff must return the claym of the property. *Coo. super Litt.* 145. *b.*

If the *Mesne* put in his Cattell in liew of the Cattell of the Tenant *paravail*, that he is bound to acquit in this speciall case, he shall have a *Replevin* of these Cattell which were never distrained. 34 *H.* 6. 47.

If the King be party, or where the taking of the Distresse is in the name and right of the King, there no *Replevin* doth lye, howsoever *prima facie* the Sheriffe may grant a *Replevin*;

vin; but being shewed that the King is party, and that the taking is in the right of the King, there the Sheriff must surcease. 3 H.7.p.1. Br. Replevin 33.

Proprietate probanda.

IT is a Writ lying where the Sheriff is coming to make a *Replevin* of goods by writ, or without, before or after *Gager de Deliverance*, and the party that hath distrayned them claimeth some property in them, so that the Sheriff can proceed no further in the *Replevin* till the property be tryed, which must be by this Writ, which must be had out of the Kings Bench, or Common Pleas, if the suit were depending there, or may be had out of the Chancery, directed to the Sheriff to try the property. *Terms ley.* 2 H.7.6. *Coo.* 8.60. *Dyer* 173. 1 *Ed.* 4. 9.

And if upon this the Sheriff find the property with the Defendant he must surcease? (but it is but an enquest of Office, and therefore albeit it be found against the Plaintiff, yet he may have a writ of *Replevin* to the Sheriff, and if he return the claym of property, *&c.* yet shall it proceed in the Court of Common pleas, where the property shall be put in issue and finally tryed.) And if he find the property with the Plaintiff, then may he proceed in his *Replevin*. *Coo. sup. Litt.* 145.

Homine Replegiando.

IT is a writ lying where a man is imprisoned (and not by any speciall Commandement from the King, his Justice, nor for the death of any man, nor for the Kings Forrest, nor for such cause for which a man is not repreviable) in such case, where he may be bayled by the Law; or where one is deteyned as Villeyn, or Ward, and is none, then he may have this writ to the sheriff to replieve him. *Terms ley. F:N:B:* 66.189. *Dyer* 60. *Westm.* 2. *cap.* 11.

But the sheriff must take take great heed, he be to be replieved and bayled by law: And in this case if the sheriff return that the Defendant hath eloigned his body, so that he cannot make Deliverance, *&c.* then the Plaintiff may have a *Capias in Withernam* to take the body of the Defendant, and to deteyn him, *&c.* although he be a Peer of the Realm: and

if

if upon this he return *Non est inventus*, then there shall go forth a *withernam* against the goods of the Defendant. *F. N. B.* 68. 21 H. 4. 15.

Pledges. Deliverance.

It is where one hath sued a Replevin, and hath not the goods delivered, and the other avoweth; Now he may shew this in pleading, that the Defendant is still possessed of the goods, and pray that he may put in pledges for the deliverance; which when they come to issue or demurrer, or before, if the Defendant do not claim property, shall be granted him, and then a Writ shall go to the Sheriff to deliver them: (*x*) But where the Avowant doth claim property in them, this is not grantable. *Terms ley* (*x*) *Stanhop & Cavendish, M.* 2. *Jac.* 2. *B. R.*

Where it lyeth, and where not.

If one make a Lease to another for years, rendring Rent, with clause of distress, and to retain the Distress till agreement be made unto him against Gages and Pledges, yet by the Court he shall gage deliverance, for otherwise by this new invention all Replevins shall be taken away. *Co. 5. Lit.* 282. *b.* 31. *c.* 3. *Gager Deliverance* 5.

Second Deliverance.

It is a Writ lying after a Replevin is brought, where the Plaintiff maketh default, being Non-suit before Declaration, or the like, or Judgment is given against him, then he that distrained the beasts, shall have them delivered to him again by this writ. *Terms Ley, Replevin, fol.* 13. *E.* 1. *cap.* 2. *Dyer* 41. *a.* 4.

Return Habere.

It is a Writ lying where a Plaint is removed out of the County-Court, or Court-Baron, by a *Pone* or *Recordare*, into the Common-bench, and after the Plaintiff in the Replevin is Non-suit before any Avowry be made; notwithstanding this Non-suit, the party that distrained may have again the same Distress by this Writ (which is only to revive the first Suit.) And the Defendant in this case cannot have a Recaption for a double Distress: And after this Writ had, and tryall thereupon; or that the Plaintiff be again Non-suit before Declaration, Return irrepleviable shall be awarded to the Avowant, and then he make his Avowry, to the intent to ground a Writ to enquire of Damages, or he may hold the beasts as a Distress till he be satisfied: And if any *Returna habendo* go forth before this Writ, this is a *Supersedeas* to it, and the She-

Return irrepleviable.

riff must not proceed upon it. *F. N. B. 72. Dyer* 41, 42. 280. 59.

Withernam. It is a Writ lying where he that distraineth, or the owner of the Cattell, after the Distress taken doth essoyn them, or carry them out of the County, or holdeth and keepeth them in some Castle; so that the Sheriff cannot make a Replevin, or *Returno Habendo* (as occasion is) then the Sheriff by this Writ may take so much of the other Goods, or Cattell of the party that hath done this, instead of them. And if they be in a Castle within his County, the Sheriff may take *Posse Comitatus*, and break into the Castle, and make Replevin. 3 H: 7. 1. *Terms ley. Distress, F: N: B:* 73. *West:* 1. *cap:* 17. *Dyer* 41. 59.

If the Plaintiff be in a Franchise, and the Sheriff make his Warrant to the Bayliff, and he return, he cannot come by the Beasts; he may enquire at the next County-court, and being found, he may *Ex officio* grant a Precept in the nature of a *Withernam* to take the Defendants Goods, or he may have the Writ out of Chancery. *Dalton le office des Vicounts, fol:* 167.

Recaption. It is a Writ lying where a man is distrained for any Services, and hanging that Suit, he is distrained again for the same cause (though the Distress be for Services due after the first Distress) yet it lyeth not untill the first Suit be determined. *F: N: B.* 71. *Finches ley* 446.

Where it lyeth, If one dstirain two mens beasts first, and then distrain the beast of one of them after, he may have this Writ. *F: N: B:* 71.

If the Lord distran for Rent, or service behind, and afterwards hanging the Plea, the Lord commands his Bayliff to distrain for the same Rent or Service, the Tenant shall have a Writ of Recaption against the Lord. *S. m. br.* 71. *f.*

And where not. It lyeth not in these cases; 1. Where the Distress is for Damage-feasant upon a new Trespass. 2. Where the second distress, is not the goods of the same man. 3. When the second distress is by another person. 4. Where it is by a second Deliverance. *F. N. B.* 71.

The Lord distrains an Oxe which is not sufficient for the Rent behind (there being then no more beasts there) he

he may come again and take a Cow, and at another time take another Cow, till he hath sufficient distress. *Abridgment. Al. f.38. Br. Distress 98.*

It seems it is sometimes taken for the doctrine or learning concerning Bastards, and sometimes for the Offence or Fault. *Terms ley.*

Bastardy.

A Bastard is one that is born of any woman, so as his Father is not known by order of Law, and he is called *filius populi. Co:8.102.6.65. Super Lit.244.*

Cui pater est populus, pater est sibi nullus, & omnis.
Cui pater est populus non habet ipse patrem.

Mulier.

Mulier is one lawfully begotten and born; And this word is used alwaies in comparison with, or opposition to a Bastard, to shew the difference between them: For *filius natus vel filia nata ex justa uxore appellatur in legibus Anglia filius mulieratus, seu filia mulierata. Coo:super Lit:243.b.*

Wher and what Issue shall be counted a Bastard.

If a woman have a Child before the Espousals (by whomsoever it be) it is a Bastard, for that is born out of lawfull marriage: And if the Child be be gotten by him that doth afterwards marry her; yet it is in Judgment of the common Law a Bastard, but this the Church doth hold legitimate. *Stat. 20.H.3:cap:9. 1 H:6:3: Co:Super Lit:244.*

If one marry his Cosin, *infra gradus maritagii*, and have issue by her, and after they be divorced in their life time, their Issue is a Bastard, 48 *Ed:4:28: Brow:Sect:48:*

Where not.

If a man or woman marry a second Wife or Husband, the first being living, and have Issue by that second Wife, or Husband, such Issue is a Bastard, 39 *Ed:3. 14:7 H:4:9: 18 Ed: 4:26:*

If one marry a woman and dye before night that he lye with his Wife, and she have a Child after, it seems it shall be accounted his Child, and Legitimate; *See English Lawyer, fol: 117.*

If a woman elope with a stranger in Avowtry, and hath a Child, her Husband being *infra quatuor maria*, this is legitimate and shall inherit his Land when he dyes, 44 *Ed. 3. fol: 10.7 H:4.10.*

No Deviſe made after the death of the Father and Mother can make the Iſſues Baſtards, *Bro: Baſtard* 23. 39 *Ed:* 3. 32.

If a woman elope from her Husband, and live in Avowtry, her Husband being beyond the Sea, that he cannot come at her, and ſhe have Iſſue in this time, it ſeems this is a Baſtard: But by the common Law, if the Husband be within the four Seas [i.] within the Juriſdiction of the King of *England*, if the Wife have Iſſue, no proof is to be admitted to prove the Child a Baſtard, unleſs there be an apparant impoſſibility in the Husband of procreation, as if he be but eight years old, or under the age of procreation; for in that caſe ſuch Iſſue is a Baſtard, albeit he be born within marriage, 43 *Ed:* 3:19. 7 *H:* 4. 9. 7 *H:* 5. 9, 44. *Ed:* 3. 10. 1 *H.* 6. 7. 19 *H.* 6 17. *Co: ſuper Lit:* 244.

If a Child be born within the uſuall time, which is within the tenth Solary month (accounting the month thirty dayes) after a mans death; it ſhall be reputed a *Mulier*, and the Child of him that is dead; but if not, it ſhall be reputed a Baſtard, unleſs the woman be married to another Husband: but the moſt naturall time is eight and twenty dayes, nine Solary months and ten dayes; which is forty weeks, but ſome come ſooner, and ſome ſtay longer, as occaſions be; and therfore it is held by the Doctors of Phyſick that any day in the tenth Solary month the firſt or laſt, is naturall enough. But the breeding and travail is ſomtimes longer or ſhorter according to the weakneſs or ſtrength of the Mother, or Child, or other matters, *Co: ſuper Lit:* 123. *Arſops caſe*, *M.* 17. *Jac: R. B.*

This caſe was; The Husband dyed the three and twentieth day of *March*, after his death his Wife (being known a lewd woman) was in travail five weeks, and in the midſt of her travail was turned out of doors, ſo that ſhe was not delivered untill the fifth day of *January*, which was one and forty weeks, yet was adjudged that this Child was legitimate, *Arſop verſ: Botrell*, *M.* 17. *Jac: B. R.*

But if the Iſſue be born within a month, or a day, after marriage, between parties of full lawfull age, the Child is a legitimate Iſſue, and no Baſtard, albeit it be apparant it was anothers Child, and not his that married the woman; and he

must

must Father him, for whose is the Cow his is the Calfe, 18 *Ed.*4.28. *Coo.super Lit.*244.

If a marriage be *infra gradus maritagij*, and they have Children and one of them dye, and after a nullity and divorce is made of the sayd marriage, yet the Issue between them are no Bastards, but *Muliers*, 39 *Ed.*3.32. *Broo.sect.*48.

If a Divorce be well made of a former marriage, *causa precontractus*, and either of the parties marry again, and upon this second marriage have Children, these Children are legitimate, and not Bastards, *Coo.*4.29.

All Children that are born beyond Sea, whose Parents at the time of their birth be of the faith and legeance of the King of *England*, shall be legitimate, and have the same advantages as others born within the Realm, *Stat.*25. *Ed.*3. *de natis ultra mare*, *Dyer* 224.

A Bastard the elder and Mulier.

where possession of the elder issue which is a Bastard, dying seised makes his Son his Heire, where not, and although the younger Son occupy the Land with the elder.

If one have a Son or a Daughter by a woman before marriage (which is a Bastard) and after he marrieth the woman, and they have another Son or Daughter (which is a *Mulier*) and the Father dye seised of Land, the second Son or Daughter shall have this Land, and not the Bastard; and if the Bastard enter upon it the *Mulier* may out him; But if the Bastard shall enter first, claiming as Heir to his Father, and shall occupy the Land all his life-time without any entry, or continuall claim made by the *Mulier* all the life-time of the Bastard, and he have Issue and dye seised of such Estate in fee, and the Land discend to his Issue, and his Issue entreth, &c. In this case the *Mulier* which is lineall, as also the collaterall Heir is remediless, and the Issue of such Bastard shall have it, notwithstanding the *Mulier* be an Infant, or Feme Covert, and notwithstanding the Issue of the *Mulier* enter before the Issue of the Basta d; and notwithstanding the Issue of the Bastard endow the Wife of the Bastard, and notwithstanding the Bastard after his entry, enter into Religion, and therupon the discent be, and notwithstanding the discent be of Rents, Services, Reversions expectant upon Estates in tayl, wherupon Rents are reserved, *Litt. Sect.*399.340. *Coo.super Coo.*17. *Ed.* 3.15. 20 *Ed.*3.16. 14 *H.*4.9.

But

But if the *Mulier* do make continuall claim during the Baſtards life; or if the *Mulier* do once enter and be after diſſeiſed by the Baſtard, or if the Baſtard dye without Iſſue, and the Land Eſcheat, or if the entry of the Baſtard were by a ſtranger, without any commandement, precedent, or aſſent ſubſequent of the Baſtard; In theſe caſes the *Mulier* is not barred. *Co. ſuper Lit.* 243. 244.

If one have Iſſue two Daughters, and one is a Baſtard, and the other is a *Mulier*, and they enter and occupy together all their lives, and the Baſtard dye ſeiſed, the Law will adjudge the Moyety in her Heir. *Co. ſuper Lit.* 214.

What things a Baſtard ſhall have, and of what he is capable, where not.

A Baſtard may purchaſe Land, or buy and ſell Goods or Chattels as another man may: Alſo he is capable of Land by deviſe from his Father, or any other, by that name wherby he is commonly called, *Perk. Sect.* 488 505.

But he cannot inherite Land as Heir to his Father, neither can any inherite Land as Heir to him, but one that is Heir of his body, but it will rather Eſcheat. *Lit. Sect.* 401. *Fitz. R.* 20.

If he be a Baſtard born in Adultry or Inceſt, it ſeems he is not capable of any benefit from ſuch inceſtuous Parents more then for neceſſaries only, *Swinb. In Wills.*

What alls a Baſtard may do, or not do.

It ſeems he may do all Acts, as give, or grant, or ſell his Lands, Goods, or Chattels, by act executed in his life, or by his Will at his death, as any other man may, by the name wherby he is commonly called; but he cannot bring a Writ of Detinue, or the like, as Heir to any man, *Perk. Sect.* 26. *Co.* 6. 65. 35 *H.* 6. 9.

Pleading and tryall of Baſtardy.

Baſtardy is pleaded and alledged ſomtimes generally (*i*) when one ſayth that another is a Baſtard, but ſheweth not how, or ſpecially (*i*) when he doth ſhew how: In the firſt caſe it ſhall be tryed by the Certificate of the Biſhop, albeit the Iſſue were born beyond the Sea; and this will bar the parties and all others: But if the Biſhop certifie he is a *Mulier*, this is examinable and traverſable. In the ſecond caſe, when it is pleaded it is to be tryed by the Country, not by the Biſhop: And where a Writ of Certificate is to be ſent to the Biſhop, ſolemn proclamation is to be made firſt in the Chancery, and in the Court where the Cauſe doth depend, that all perſons

persons that can and will attend the Bishop, to make their Allegations to prove the Bastardy: For which *See the Statute, 9 Hen. 6. cap. 11. 40 Ed. 3. 39. Plow. 74. fin. 25. Ed. 3. de natis ultra mare.*

If one marry a Virgin with Child, and it be born during the Espousals, he must Father it, let it be whose it will: And if she be a Widdow and with Child visibly by her first Husband at the time of his death, and take another Husband, and be delivered during the next Espousals, in this case it shall be reputed the Child of the former Husband: But if she were so privily with Child at the time of her latter marriage, as it cannot be discerned, it shall be reputed the Child of her latter Husband, if by possibility of nature it may be so, 21 *Ed.* 3. 19. *What person shall be reputed the Father of a Child.*

If *A.* marry *B.* and dye, and within ten dayes after his death she do marry *C.* and hath Issue by eleven dayes after the usuall time of forty weeks, from the death of *A.* this shall be reputed the Child of *C.* and not of *A.* So it seems if the Child come eleven dayes before the usuall time, it shall be reputed the Child of *C.* not of *A.* 18 *Ed.* 1. *Com. Bast. case, Rot. B.*

Bastardy is an offence against the Spirituall Law, and therefore punishable in the Spirituall Court; It is also offence against the common Law and punishable in the temporall Courts; and two Justices of Peace, whereof one to be of *Quorum* that are next to the place where the Bastard is born, may examine the matter, and punish the parties offending according to their discretion: And if it be a Bastard that may charge the Parish, the Justices may send the Mother to the house of Correction; As also for the keeping of the Bastard to discharge the Parish where it is born, and to charge the Mother and reputed Father; And if they refuse to obey the Order made by such Justices, or to give good bayl to perform the sayd Order, or to appear at the next quarter Sessions, they are to send them to Goal, there to abide without bayl or main prise. *Stat. 18. Eliz. cap. 3: 7 Jac. cap. 4.* *The punishment of Bastardy.*

This

Beadle. This word is sometimes taken for an Officer in a Forrest that doth execute all the processes there. And one that is like to a Bayliff errant of a Sheriff in a County. And sometimes it is used for such a one as is appointed in Townes for the whipping of Roagues, and others that are to be whipped.

Benevolence. It is sometimes given voluntarily, and of a mans good will.

The Subjects of the Realme are not to be charged by any exaction or imposition in the nature of a Benevolence. For *Magnatum potitie est perceptio. Stat. R. 3. cap. 2.*

Wood & trees. Any man that hath Wood or Trees, may by the Common Law cut his Wood and Trees, when and how he will, and dispose it to what use he will, unlesse it be in the cases of Lesse for life or years, who by Law are prohibited to make wast, or where a man hath restrained himself by speciall covenant or agreement, for which things, *See Wast* and *Covenant*, and other Titles: But now by speciall Statutes men are restrained in divers cases. *Stat. 35. H. 8. cap. 17.*

What Wood & trees may be cut, and how and in what order they must be cut and disposed afterwards. 1. He that doth fell or cut any Copes or Under-woods, or wood or trees in wast ground, if it be not above twenty foure years growth (unlesse it be in some speciall cases) must leave standing and unfelled in every Acre, twelve standils or storers of Oak, if there be so many there, or otherwise so many of Elme, Ash, Asp, or Beech, to make them up twelve. And those of such as are like to make Timber, and were left the time the wood was cut last before; and if there be not so many of them, then so many others of those that are standing at the time of the fell of the most likely trees; and those standils so left must be preserved and not cut untill they be ten inches square within three foot of the ground, under paine of three shillings four pence for every tree so cut and not left before, or not preserved or cut after; and if the wood be above twenty four years growth, then he must leave standing twelve great Oaks, or if there be not so many, other Trees, and these must be afterwards preserved, and not cut down twenty years after, (except it be to repaire the owners house, water works, Garden,

dens, Pales of Parks, or the like, under paine of six shillings eight pence for every Tree not so left, or being left, not after preserved.

2. He that is Lord or owner of a Wood, wherein others have Common, cannot sell any part of it (except it be for his own private use (*i*) for reparations of his house, or for fire, or the like) until he hath a fourth part devided from the rest, and fenced and inclosed by agreement between him and the Commoners and tenants, or (if they cannot agree upon the division) by order of two Justices of the peace, and then he may sell that fourth part (but he must leave and preserve the standills as before) and after that division and selling, the Commoners are not to have Common there, but in all the other three parts they must take their Common as before time, and therein during the inclosure, the Lord is to have no Common. *Inclosure.*

3. No person may convert or imploy to coale, or other fuell for the making of Iron, or Iron mettall, any part of any Timber tree or Oak, Beech, or Ash, of the breadth of one foot square at the stub, growing within fourteen miles of the Sea, or any part of any of the great Rivers, by which carriage is used by Boat, nor any other wood or under wood within twenty two miles of the City of *London*, and some other places (for which see the Statute) and Iron Mills. (3) *Stat.* 1 *Eliz. cap.* 15. 23 *Eliz. cap.* 5. *Iron.*

4. No person, nor the Kings Purveior himself (unless it be for necessary Timber for Houses, Shipps, and Mills) may sell any Oaken Trees meet to be barked, where it is worth two shillings a cart load, besides the charge of barking and pilling, but between the first day of *April*, and the last day of *June*, under pain of the losse of the double value thereof, and if the Kings Purveior take any such tree, the owner may keep back the bark, Lop and Top thereof. (4) 1 *Jac. cap.* 22. *Bark.*

5. None may destroy any woods, or convert into tillage or pasture, any wood or under wood, that is two acres or more in quantity, and two furlong distant from the house of the owner of the wood, or to which the wood doth belong, under paine of forty shillings for every Acre. (5) 35. *H.* 8. *cap.* 17.

Inclosure.

And whosoever doth cut down any under-woods or Copes of twenty foure years growth or under, not only may, but must inclose it, or preserve it from Cattell six years after. And if it be of the growth of fourteen yeares and under twenty four years, he must inclose or preserve it eight years after: And if it be above the growth of twenty four years, he must inclose or preserve it nine years, under paine of three shillings four pence for every Rood, not so inclosed, or preserved. But if it be in a Park where is game, there he must inclose or preserve it four years only, and no more under the like paine. But if any stranger spoile the bounds, he must bear the penalty, not the owner. *Idem.*

Any person may sell and inclose all their woods and under-woods in any wast grounds, which have been used to be inclosed and kept for the maintenance of wood and underwood.

Fuell.

For the Assise (*i*) the breadth and length of Fuell (*i*) Talwood, Billet, Faggot, in and about *London* and other Townes Corporat and Cities, and who may buy the same: *See Stat. 7. Edw. 6 cap. 7. 23. Eliz. cap. 14.*

The remedy for wrongs, and the Trespass done to and about a mans Woods and Trees.

If a stranger trespasse me in my wood or trees, I may have an Action of Trespasse, for which see *Trespasse*, if it be my tenant, there in some cases I may have an Action of Wast, (for which see *Wast*) And if the soile of the wood be myne in proper, there I may have the same remedy against a Trespasser as if it were in any other severall close. But if it be in such a wood wherein others have Common of pasture, therefore any Trespasse to the woods in cutting them down, or the like: I may have an Action of Trespasse: But if it be in the pasture of a Common wood I can bring no Action more then another Commoner. *Co. 8. 138.*

If the Lord have the 4th. part of a Wood by a due inclosure to him self (as above) no Commoner may put in any Cattell there, untill five years after the time of Inclosure, and then but Calves, and yearling Colts only untill six years if the wood were under the age of fourteen years at the last fall, or else untill the age of eight years, if the wood were above twenty four years, under pain to forfeit foure pence a Beast. But if the cattell of the Commoner be put in, the Lord can

have no action of Trespasse against him, for by the Common Law untill this Statute, he that had a wood wherein another had Common, could not inclose it, and exclude the Commoner. *Coo.* 8. 138 *stat.* 35. *H.* 8. 17. 13. *Eliz.* 25.

If a man suffer his Swine to come into such an inclosed wood, during the time of the Inclosure or it as above, unringed or unpegged, he shall forfeit four pence for every Swine. 35. *H.* 8. *cap.* 17.

If a man do purposely burne a heap or pile of wood, or bark any Apple, Pear, or other fruit trees, the owner shall recoves treble damages in an Action of Trespass, and he that doth it loose ten pound to the King. *Stat.* 37. *H.* 6. *cap.* 6.

If any cut or take away any Hedge, Pales, Railes, or Fence, cut, or spoile any woods, or under woods, or digg or take up any fruit trees, besides that the Party grieved may have an action of trespass, he may complaine to a Justice of Peace, and he must compell the offender to make the party offended an amends, or else the Delinquent must be whipped. *Stat.* 43. *Eliz. cap.* 7.

For the woods of Forrests. *See Stat.* 1. *Ed.* 3. 2. 9 *H.* 3. 9. 12. 13. 22. *Ed.* 4. 7. *Coo.* 8. 36.

IT is a Precept in the Kings name written in Parchment and sealed with his Seal. Wherein there is 1 *Salutation.* 2 The matter but very briefly set down, and therefore it is called *Breve.* 3 The *Conclusion.* *Briefe or Writ.*

And therein is. { 1 *The Test.* 2 *The Place.* 3 *The time of the date.*

It is most commonly open, and there it is called *Patent*, but sometimes it is inclosed, and then it is called *Close.* Also some Writs are originall (i) to bring matters to Judgement, or preceding it. Others are judiciall, tending to execution of Judgements, or of that nature; and of both these kinds, there are many particular individualls following. *Coo. super Litt. fol.* 73. 18. *H.* 8. 5.

Of Rights. This is the highest Writ of all others: For whereas other Writs in reall Actions, be only to recover the possession of the Land, which hath been lost by our Ancestor or our selves, this aimeth both at the seisin, which some of our Ancestors or we had, and also the property of the thing wherof our Ancestor died not seised as of Fee, and whereby are pleaded and tryed both the rights together, *viz.* as well of the right as of the property; Insomuch as if a man once loose his cause upon this Writ, either by judgement, Assise, or Battell, he is without all remedy for ever. *F. N. B. fol.*

Of Entrie. It is a Writ whereby a man seeketh Entrie into his lands or Tenements, out of which he is put or kept out, as when one is disseised or put out of his Freehold, then he or his Heir may have this Writ against the Disseisor, or any other after tenant of the Land. *Termes of the Law. Plow.* 93.

Quotuplex. This Writ is sometimes in the *Per*(*i*) where a man is disseised of his free-hold, and the disseisor alieneth, or dieth seised, and his heir entreth, then the Disseisee or his heir shall have this Writ against the *Alienee*, or heir of the Disseisor, and the Writ shall say, *In quod A non habet ingressum nisi per B quibus illud ei dimisit qui inde eum injuste disseisivit, &c.* But if the disseisor alien, and the *Alienee* dieth seised, or alieneth over to another, or if the Disseisor dye, and his Heir enter, and that Heir alieneth, or dieth seised, and his heir enter, then the Disseisee or his heir shall have a Writ of *Entrie. Sur disseisin* in the *Per & Cui*. And then thee writ shal say, *In quod idem A. non habet ingressum nisi per B. Cui C. illud ei dimisit qui inde injuste, &c.* But this writ in the *Per & Cui* is not maintainable against any, but one that is Tenant by purchase or discent. For if it be otherwise, as if he be in either by intrusion, when the Disseisor doth dye seised, and a stranger doth abate; or disseisin, as when the disseisor is disseised by another; or succession, as when the disseisor is a man of Religion, & doth dye, or is deposed: or by judgment, as when he recovereth against the Disseisor; or by Escheat, as when the Disseisor dyeth without heir, or doth felony, and the land escheat; In all these cases the disseisee must bring his writ in the *Post* not in the *Per* nor *Cui*. And then the Writ shall say, *In quod A. non habet ingressum nisi post*

Dis-

disseisinam, quia B. non injuste & sine judicio fecit præfato N. vel M. provado N. cujus hæres esse est.

This is a Writ, and lyeth where tenant for terme of life, or by the curtesie alieneth in Fee, leaving him in Reverlion, then he shall have this Writ against the tenant for his relief. And it is given by the Statute of *Westm. 2. cap. 24. Terms of the Law.* *Entrie in Casu Consimili.*

This lyeth where a Tenant in Dower doth alien in Fee or for terme of anothers life, leaving the tenant in dower, then he in Reversion shall have this Writ. And it is given by the Statute of *Glouc. cap. 7. Termes of the Law.* *Entrie in Casu proviso.*

This lyeth where Tenant for terme of his own or anothers life, tenant by the curtesie or in Dower alieneth and dyeth, then he in Reversion shall have this Writ against whosoever is in after in the said tenement. *Terms of the Law.* *Entrie ad communem Legem.*

This lyeth, where a Bishop, Abbot, or other that hath a common Seal, alien the Lands they have in the right of their Churches, without the consent of the Covent or Chapter and dy, then the successor may have this Writ, or a Writ of Right, *Lit. Br. 380. Stat. Termes of the Law fol. 80.* *Sine Assensu Capituli.*

This lyeth for a man where he is put out of his Lands or Tenements, or any profit aprender, as Rent, Common, &c. to be taken in a place certain, and so disseised of his Freehold, then he may have this Writ to recover the same again. *Cur. super Litt. 153.* *Assise.*

It is a Writ founded upon the Statute of *Westm. 2 cap. 38.* and upon the Statute of *Articuli super Cartas cap. 9.* which Statutes do shew what persons Sheriffs ought to impannell upon Assises and Juries, and what not. For which see *Regist. fol. 78. Fitz. N. B. 165.* *Ponendis in Assisis.*

It is a Writ awarded to reexamine or review a matter passed by Assise before any Justices, and is used when a man appeareth by his Bayliff to an Assise brought by another, and loseth the day, and hath some other matter to plead further for himself, as a Deed of Release, or &c. which the Bailiff did not plead or might not plead for him, desireth a better examination of the cause, either before the same or other Justices. And for that purpose hath Letters Patents, and a Writ to the Sheriff, to call the party for whom the Assise passed, and *Certificas de Assise.*

the Jury which was impannelled upon the same Assise before the Justices. *Termes of the Law.*

Formedon. It is a Writ that lyeth where a tenant in taile doth discontinue, or is disseised and dyeth, then the issue in taile may have this Writ for his remedy. But there be three manner of *Formedons*. One is in the discender, and that is in the case before said. And if one give Lands in the taile, and for default of issue, the Remainder to another in the taile, and that for default of such issue, the land shall revert to the Donor, if the first tenant in taile dye without issue, he in Remainder shall have this Formedon in the Remainder. But if the Tenant in tayl dye without Issue, and he in Remainder also dye without Issue, then the Donor, or his Heirs shall have a *Formedon* in the Reverter. *Termes of the Law.*

Quotuplex.

Accedas ad vice comitem. It is a Writ directed to the Coroner, commanding him to deliver a Writ to the Sheriff, who having a *Pone* delivered him, suppresseth it. *Termes of the Law.*

Pone per vadium. It is a Writ commanding the Sheriff to take surety of one for his appearance at a day assigned. For which see Register, *in verbo pone.*

Bilanciis deferendis. It is a Writ directed to a Corporation for the carrying of weights to such, or such a haven, for to weigh the Woolls that such a man is licenced to transport. *Regist. fol.* 270.

Occupavit. This is a Writ that lyeth for him which is ejected out of his Land or tenement in time of Warre, as a writ of *Novel disseisin* lyeth for one ejected in time of peace. *Ingham.*

Ponendo in ballium. It is a Writ whereby to will a Prisoner held in Prison to be committed to Baile in cases Bayleable. *Regist. Orig. fol.* 133.

Perambulatione faciendâ. It is a Writ sued out by two or more Lords of a Mannor, lying near one another, and consenting to have their bounds severally known, which is directed to the Sheriff, and doth commend him to set down their certain limits between them. And it is usually sued upon some Incrochment by one upon the other. And if the Incrochment have been made by degrees, and one of the Lords refuseth to assent, the other may have a Writ called *Rationabilibus divisis* to compell him, but if the Incrochment hath been made at once, an Assise of *Novel Disseisin* lyeth. *Fleta. N. B. fol.* 133.

Rationabilibus divisis.

It

It is a VVrit whereby the King willeth the Justices in *Eyre*, to admit of an Attorney for the defence of another mans liberty before them, *&c. Register fol.* 19. *b.* *Libertatibus exigendis in Itinere.*

It is a VVrit that lyeth for a Citizen or Burgess of any City, that contrary to the Liberties of the City or town whereof he is, is impleaded in the Kings Court, or before any of his Justices that do refuse or deferre to allow his Priviledge. *Fitz. N. B.* 229. *Libertatibus Allocandis.*

It is a Writ to take him that hath taken any Bondman or Woman, and led him or her out of the County, so that he or she cannot be replevyed according to Law. *Terms of the Law.* *Homine capto in withernamium.*

There are divers kinds of this Writ. (now out of use) For which read: *Register Orig. verbo. Non distringendo.* *Non distringendo.*

It is a Writ in the nature of a Commission directed to a Sheriff, for the dispatch of Justice in some special case, wherewith of his own authority, he cannot deal in his County Court, As if the summe demanded be above forty shillings in debt or damages, or the like, and by this the Sheriff may hold plea of any summe, whereas of his ordinary authority, he can hold plea there but of summes under forty shillings. *F. N. B.* 86. *Finches ley* 102. *Justicies.*

And this is to be sent to the Sheriff, not to the Steward of the Court. And he is hereupon to proceed as he doth in other cases, for the Writ doth not alter the nature of the suit, and when he hath done it, he need not make any Returne therof. *6 E.* 4: 3. *Fitz. N. B.* 86.

It is a Writ that lyeth for Prebendaries or other spirituall persons being distreyned by the Sheriff or Collectors of fifteenths for the fifteenth of their goods, or to be contributory to taxes. *Fitz. N. B. fol.* 176. *Parsons nor Prebendaries shall not be charged with fifteens*

It is a Writ that lyeth for a man who is taken for a suspition of Felony, and offering sufficient bayle for his appearance cannot be admitted thereunto, by the Sheriff, or other having power to let to main prise. *F. N. B.* 249. *Manucaptio.*

It is a Writ to inhibit Baylisses, *&c.* from distrayning any man with out the Kings VVrit, touching his Free-hold. *Regist. fol.* 171. *b.* *Non inplacitando.*

It

Precipe.

It is a kind of Writ of great diversity. For there is,

1 *A precipe quod reddat.*

2 *A precipe quod faciat.*

3 *A precipe quod permittat. Fitz. N. B. fol. 5.*

Precipe in Capite.

And sometimes it is called a Writ of Right close, as a *Precipe in capite*, when it issueth out of the Court of Common Pleas, for a tenant holding of the King in chief and of his Crown, and not of him as of any honour, Castell or Mannour: sometimes a Writ of Right patent, as when it issueth out of any Lords Court, for any of his tenants deforced against the deforcer, and must be determined there. *Fitz. N. B. fol. 5.*

Non intromittendo. &c.

It is a Writ directed to Justices of the Bench, or in Eyre, willing them not to give one hearing, that under colour of intitling the King to Land, *&c.* as holding of him in *Capite*, deceitfully obtained the Writ called *Precipe in Capite*: but to put him to his Writ of Right if he think good to use it. *Regist. orig. fol. 4. b.*

Non mercandizando victualia.

It is a Writ directed to the Justices of Assise, commanding them to enquire whether the Officers of such a Town do sell Victualls in grose, or by retail, during their Office, contrary to the Statute, and to punish them if they find it true: *Regist. fol. 134.*

Non procedendo ad Assisam Rege intuitus.

It is a Writ to stop the tryal of a cause appertaining to one that is in the Kings service, *&c.* untill the Kings pleasure be further known. *Regist. fol. 220.*

Non Residentia pro Clericis Regis.

It is a Writ directed to the Ordinary, charging him not to molest a Clerk imployed in the Kings service, by reason of his *non residence*: *Regist. orig. f. 58.*

Licentia surgendi.

It is a Writ whereby the tenant essoined *de malo lecti*, obtaineth liberty to arise: for after a tenant is thus essoined in a reall Action, he may not arise out of his bed, or at least go out of his Chamber, untill he had been viewed by Knights thereunto appointed, and upon view of his sickneſſe, have a day assigned him to appeare, or else lye untill he be licenced by the Court to arise. *Regist. f. 8.*

Licentia transfretandi.

It is a Writ or Warrant directed to the keepers of the Port at *Dover*, *&c.* willing them to let some pass quietly over Sea

Sea that hath formerly obtained the Kings licence thereunto. *Regiſt. orig. fol.* 293.

It is a Writ, and lyeth where the Tenant in the tayl, Tenant in dower, or Tenant for tearm of life looſeth by default in any Action, then he that looſeth ſhall have this Writ againſt him that recovereth, or againſt his Heyr, if he think that he hath better right then he which recovered. *Termes of the Law.* *Quod ei deforceat.*

It is a Writ that lyeth for thoſe that are called to the Sheriffs Turn out of their own Hundred. *Regiſt. orig.* 174. *Turno Vice-comitum.*

It is a Writ that lyeth where a man deviſeth lands in a Citty or Burrough where lands are deviſable, and the Deviſor dieth, and his Heyre or ſome other abate in the Lands, then the Deviſee may have this writ before the Mayor or Bayliffs of the Town. *Termes of the Law* 141. *Ex gravi Querela.*

It is a Writ or authority given to a perſon to enquire of ſome thing for the Kings advantage, whereof ſee divers particulars in *Regiſt. orig. fol.* 72. 85. 124. *Inquirendo.*

It is a Writ, and lyeth where a man before the Statute of *Quia emptores terrarum* infeofled another by deed to do certain ſervice, if the Feoffer or his Heyrs diſtrayn him to doe other ſervice then is compriz'd in the deed, then the Tenant ſhall have this Writ, commanding him that he diſtrain him not to doe other ſervice then that which is comprized in the Deed: But this Writ lyeth not for the Plaintiff which claimeth by purchaſe from the firſt Feoffee, but for him which claimeth as Heyr to the firſt Feoffee. *Termes of the Law.* *Contra formam feoffamenti.*

It is a Writ, and lyeth where a man hath given Lands in perpetuall Alms to any of the late houſes of Religion, as to an Abbot or Covent, Warden, or Mr. of Hoſpitall, and his Covent to find certain poor men, or to ſay Divine Service, or the like, and they alien it, then the Donor or his Heyrs may have this writ to recover the Land. *Termes of the Law.* *contra formam collationis.*

It is a Writ lying for them that are within the Dioceſſe of *London*, and Province of *Yorke*, by reaſon of a certaine cuſtom they have, that after the Debts and Funerall expences of a man deceaſed are defraid, the Wife and children ſhall have each of them a third part of the reſidue of the goods, *Rationabilis parte bonorum.*

which if the Executors will not deliver, may be recovered of them by this Writ. *F: N: B:* 122. *Cook, super Littleton,* 276.

Ventre inspiciendo.

It is a Writ for the search of a woman that saith she is with child, and thereby with-holdeth land from him that is the next Heyr at the Common Law. *Regist. orig f.* 227.

Comitatu commisso.

It is a Writ or Commission whereby the Sheriff is authorised to take upon him the sway of the Countrey. *Regist. orig.* 295.

Permutatione Archidiaconatus, &c.

It is a Writ to an Ordinary, commending him to admit a Clerk to a Benefice upon exchange made with another. *Reg. orig. f.* 307.

Custode admittendo & amovendo.

It is a Writ for the admitting or removing of a Guardian; of which read *Register orig. & see in Judices.*

Domo reparanda.

It is a Writ that lyeth for one against his Neighbour, by the fall of whose house he feareth hurt toward his own house. *Regist. orig.* 153.

Electione Clerici.

It is a Writ that lyeth for the choise of a Clerk assigned to take and make Bonds called Statute-Marchant, and is granted out of the Chancery, upon suggestion made, that the Clerke formerly assigned is gone to dwell in another place, or hath hinderance to let him from following that businesse, or hath not land sufficient to answer his Trespass if he should deale amisse, *&c. Fitz. N. B. f.* 164.

Exoneratione sectæ.

It is a Writ that lyeth for the Kings Ward to be disburthened of all Suit, *&c.* to the County, Hundred, Leet, or Court Baron, during the time of his wardship. *Fitz. N: B:* 158.

Expensis militum levandis.

It is a Writ directed to the Sheriff for levying the allowance for Knights of the Parl. *Regist. orig.* 191. *b.*

Extirpation.

It is a Writ lying against him who after a Verdict found against him for Land, *&c.* doth maliciously overthrow any house, *&c.* upon it. *Regist. Judicial, f.* 13. 58.

Fine capiendo pro terris.

It is a writ lying for one, that upon conviction by a Jury, having his lands and goods taken into the Kings hands, and his body committed to prison, obtaineth favour by a sum of money, *&c.* to be remitted his Imprisonment, and the Lands and goods to be re-delivered to him. *Regist. originall, fol.* 132.

It

It is a Writ that lyeth for the releaſe of one laid in Priſon for a Rediſſeiſon upon a reaſonable Fine. *Regiſt. originall, f.* 122. *Fine pro Rediſſeiſinagt.*

It is a Writ to inhibit Officers of Courts to take fines for faire pleading. *Regiſt. orig f.* 179. *Fine non capiendo pro pulcre placitando.*

It is a Writ to the keepers of the Ports to let a man paſs over that hath licence of the King. *Regiſt. orig. f.* 193. *Paſſagio.*

It is a Writ directed to the Sheriffe, *&c.* willing him to charge one or more to repayr a Bridg to whom it belongeth. *Regiſt. orig. f.* 153. *Pontibus reparandis.*

It is a Writ that lyeth for him that hath a liberty to paſſe through his neighbours ground, and cannot enjoy his right, the owner hath ſo ſtrengthened it. *Flet:* *Quare obſtruxit.*

It is a Writ for reſpiting of the Sheriffs account upon juſt occaſion directed to the Treaſurer and Barons of the Exchequ; *Regiſt. orig. f.* 139. *Reſpectu computi Vicecomitis habendi.*

It is the Writ whereby all men are called originally into the Kings Bench in perſonall Action. *Latitat.*

And divers other Writs there are to be found, diſperſed in the ſeverall Titles.

IT is an aptneſſe or power to doe, or have and receive, or retain ſomething: As where one is able to give, or grant, have, or take Lands; or to ſue, or be ſued: And the perſon that is ſo capable is ſayd to be perſonable, inabled to grant, give, or take a thing granted or given: And this is oppoſed to Diſability or Non-ability; which being taken largely, is defined to be an Incapacity, Incapability, or Impotency of ſome perſons for ſome cauſes, to have and enjoy ſome benefit, or do ſome act which another might have, or do. As where one is not able, or not able but after ſuch a manner to give or grant, have or take Lands; or to ſue, or to be ſued: And in this ſenſe Diſability is ſometimes Abſolute; as of an Infant, Man attainted of Treaſon, or Felony, or the like, who are utterly diſabled by any way or meanes to make any conveyance of their Lands, but that it may be avoyded by ſome body: ſo the ſonne of ſuch a perſon attaint is utterly diſabled by any means to inherit any Land from that Father: *Capacity, or Ability.* *Perſonable.* *Diſability, or Non ability.*

And sometimes it is *Secundum Quid* only: as that of a *Feme Covert*, who cannot give or grant but by Fine, and is only disabled to give or grant by Deed; and that of the King, who is disabled to give or grant, or take or receive any thing but by matter of Record: And that of a Clergyman that hath a Benefice of eight pounds *per annum* in the Kings Books, who is uncapable of another, unless he be first qualified according to the Statute. It is also distinguished into Disability, particular or personall, and temporall, as that which reacheth not unto any other person, and is but for a time only: And perpetuall or universall, as that which reacheth to others, and is for ever. And this is caused sometimes by the act of God, as in case of the non-ability of an Ideot, and the like: And sometimes by the act of the Law, as in case of the disablity of an Alien, or a Monk: And sometimes by the act of the party, as when he is attaint of Felony or Treason; and sometimes by the act of a stranger, as in case of the disability of an Heyr by the Attainder of the Ancestor. *Terms of the Law. Kitch. fol.* 214: *Plow.* 27. *Fitz. N. B.* 35. *Coo.* 11. 77. 4. 127. 7 *H.* 7. 7: 26 *H.* 8. 1. *Coo.* 8. 10. *Stat.* 33 *H.* 8. *cap.* 29. & 6 *Ed.* 6 *cap.* 13. *Coo. super Litt. fol.* 3.

But Disability is taken sometimes more strictly: For an Exception taken against the Plaintiff or Demandant upon some cause why he cannot comence some suit in Law, and the Defendant saith, that the Plaintiff is not able to sue an Action, and demandeth Judgment if he shall be answered. And this is also sometimes Absolute, and sometimes *Secundum Quid* only. And briefly there are six causes of this Non-ability, as if he be, 1. An Outlaw. 2 Condemned in a premunire. 3 Professed in Religion. 4 Excommunicate. 5 A Villain. 6 An Alien. But in the last case the disability is only in reall actions, and not in personall actions. *F: N: B* 35. 95. *Terms of the Law.*

Note, persons capable are of two sorts:

1 Persons naturall created of God, as *A. S.* and *J. D.* &c.

2 Persons incorporate or politique, created by the policy of man: And these be of two sorts. 1 Sole. 2 Aggregate of many; And these also are of persons capable, as Mayor and

and Comminalty, Dean and Chapter: Or of persons uncapable, as Prior and Covent, &c. And some men have capacity to take, but not to hold: And some to take and hold, or not to hold at the election of them or others, and some to take and to hold both, and some neither to take nor hold: And some specially disabled to take some particular thing. *Coo. super Litt. f. 2.*

Where a man shall be said to be able to do or receive a thing or not, but hee shall be said to be disabled, or uncapable, and how.

If an Alien purchase Land in fee for life or years, after Office found, the King will have it; for the Alien is not capable of it to retain it, though he be able to purchase it: But such a person is capable of having and retayning both, a house for his habitation, and therefore he may purchase and hold such a thing. See for this *Alien. Coo. super Litt. f. 2.*

A Felon.

If a man commit Felony or Treason, and be attainted thereof, and after attainder he sell any of his lands or goods, this is voyd, for he is disabled: and if he do it before attainder, any sale of his goods or chattels is good against all men; but if he make any sale of his Lands, that may be avoyded by the King or Lord to whom it doth belong by the Forfeiture, but it is good against all others: And if a man commit felony, and after purchase land, and then is attainted; now though he were not disabled to purchase, yet he is to hold, for the Lord will have it by Escheat: And if a man be attainted of felony, yet he hath capacity to purchase to him and his Heyrs, though he cannot hold it, for in this case the King shall have it presently. *See Crom. Coo. super Litt. 2. 49 Assis. 2. 49 Ed. 3. 11.*

Attainted.

A sole Corporation.

A sole Corporation, or aggregate of many, either Ecclesiasticall or Temporall, may grant or give away that they have in most cases, as persons naturall may; but they have not capacity to hold and retayn lands as such persons may without speciall licence from the King, and yet such Corporations may purchase; but after they have purchased lands, the Lord may enter and have it. See *Mortmain. Coo. super Litt. 2. b.*

Villaines.

Villaines and Bond-men may do and receive as other men, save only against the Lords; for if they purchase lands, or buy goods, their Lords will have them. See *Villaines, Cook idem.*

An

Infants or Minors. An Infant or Minor, one under the age of 21. years, cannot give or grant away any thing they have, but it will be voyd or voydable: but such a one without the consent of any other, hath capacity to purchase, and at his full age he may agree to it, or disagree, and wave it without any cause shewed. *See more of this in Infant. Coo. idem.*

Idiots. An Ideot, or man of non-sane-memory cannot give or grant away any thing he hath, but it will be voyd or voydable; but such a one hath capacity to purchase without consent of any other, and himself cannot waive it; but if he dye in his madnesse, or after his memory recovered, without agreement thereunto, his Heyr may waive it without any cause shewed. *See more in Ideot. Coo. idem.*

Hermophrodites. An Hermophrodite may give or grant, take or purchase as another person may do according to that Sex which prevaileth. *Coo. idem & 3.*

A Bastard. A Bastard may grant or give, purchase or take, as another person may do, after he hath gotten a name by reputation, by that name so gotten. *See more in Bastard.* But if a Lease be to *A. B.* for life, the Remainder to the eldest issue male of *I. S.* and the Heyrs males of his body, and *I. S.* have a Bastard, this Issue i not capable within this limitation. *Coo. idem & 3.*

Persons deformed, &c. Persons deformed, having humane shape, Leapers, Deafe, Dumb, & blind men it seems may take and give as other persons may. *See more in Fait. Coo. 3.*

Grants voidby incapacity of the Grantees. No person but one qualified and fitted is capable of an Office, and therefore if the King grant an Office that doth concern the Administration of Justice or the Kings Revenue: Or if he grant a judiciall office to one in Reversion; or a Stewardship be granted to an Infant; these grants are voyd, for they are, or may be incapable. *Coo. 3. b.*

Some are capable of things to speciall purpose to give or grant, and not to use, so the King is capable of an Office. *Idem.*

Such as buy Offices or Benefices are uncapable thereof. *See Offices, Advowsons,* and *Simony.*

Women

Women covert may sue or be sued, but their husbands must be joyned with them. *See Baron and Feme.*

Where a man shall bee said to be able to sue or to be sued, and where not, but he shall be said to be disabled, and how.

Ideots, and men of Non-sane-memory may sue or be sued: Also such as be deafe and dumb.

Infants also may sue or be sued, and are not disabled, but if he sue, he must sue by *Prochein amy*, if he defend it must be by his Guardian.

A Villaine.

A Villaine is disabled to sue his Lord in any reall or personall action, but he may sue any other besides his Lord. *Coo. super Litt.* 127. *b.*

A person outlawed.

An outlawed person is disabled to sue any Action against any man in any Court of Law or Equity; but it seems any man may sue him. *Coo. idem* 128.

An alien enemy & Amy.

An Alien enemy is disabled to sue any action reall or personall: An Alien Amy to sue any reall action, but a personall action he may sue. *Coo. idem.*

Attaint in præmunire.

A man that is attainted in a Premunire may not sue in any Action. *Coo. super Litt.* 129.

A man professed in Religion.

A man that is professed in Religion cannot sue or be sued. *Idem* 132.

A person excommunicate.

A man that is excommunicate is disabled to sue in any Court any action whatsoever, unlesse the Excommunication were by the Defendant himself. *Idem* 134.

A man that is convict Recusant is disabled to sue whiles he doth so continue.

How long such disabilities shall continue.

But note that all these disabilities continue only whiles the same impediment doth continue: For after Infranchisement of the Villain, reverfall or pardon of the Outlawry: Pardon in the Premunire: Dearaignment of the party professed, and Absolution of the Excommunication, the disability is gone, and the party may sue as another man: Also during that time he may sue in the right of another: As an Executor or Administrator, so the Villain may sue his Lord, and the rest in the cases before. And therefore a Mayor and Cominalty in their politick capacity may have an Action, though the Mayor be outlawed. *Coo. super Litt.* 128. 32 *Ed.* 4. 12.

And in a Writ of Error to reverse an Outlawry, Utlary in that Suit or any other shall not disable him in that case. *Coo. idem.*

Also

Also Outlawries in *Chester* and *Durham* are not disabilities to sue at the Court at *London*. See more in other places.

Castle. A Castle doth sometimes signifie a strong house, or place of defence: And sometimes one or more Mannors. *Coo. super Litt. 5. a. 83. a. Star.*

Castlelaine. It is the Captain or owner of such a house, who sometimes is called the Constable of the Castle. 3 *Ed.* 1. *cap.* 7.

Castle guard. This is a tenure or Imposition laid upon such of the Kings Subjects as dwell within a certain compass of a Castle towards the maintenance of such as do watch and ward the Castle: And this where the Castle is ruinated, doth continue a tenure by Knights service. This word doth also sometimes import the very circuit it self which is inhabited by such as are subject to this service. *See Tenure. Magna Charta, cap.* 20. 32 *H.* 8 *cap.* 48.

No Subject may build a house of strength imbattel'd, *&c.* or other Fortresse defensible without the licence of the King. *Coo. super Litt. fol.* 5.

Causes and Effects. The Law in most cases hath much respect to the cause, originall, and foundation of things, and in some cases none at all. As if one whiles that he is a servant have an intent to kill his Master, and after depart out of his service, and then kill him, this is petty treason by Relation: So if a man *de non sane memorie* give himself a deadly wound, and after come to himself againe, and dye by that wound, he shall not be a *felo de se*: So if a Covenant be to make a man a lease for years, and the Covenantee dye before the lease be made, and then the lease is made to his Executors, this shall be accounted Assetts, *Causa & origo est materia negotii*: And for this cause it is, that an outlawry in felony is a forfeiture of a mans land, and so it is not in trespasse; for albeit the not appearing be the next cause of both, yet in the first cause they do differ. *Coo.* 2. 99. *Plow.* 292. *Coo.* 2. 92.

If timber trees that are not titheable become rotten and dry, *non portans fructum nec folia in æstate, nec existens macie minus*, yet their privileg doth remain, and they are tythe-free still: So if an estate in tayle become an estate in taile after possibility of issue extinct, yet many of the Priviledges annexed

vested to the first estate remaine still. And hence appeareth, that effects doe sometimes continue when their causes are gone. But for the most part these Rules hold, *Sublata causa tollitur effectus, & cessante causa cessabit effectus*: As when a Guardian in Socage dyeth, the wardship of the Infant shall cease, and not goe to his Executor: So if one give Land or Goods with his Daughter or Kinswoman in Marriage, and after they are divorced, now shee shall have all the goods again that are not spent: So if one enter into Religion, and make his Executors, and after bee atraigned, he shall have the goods again that remayn. If the King grant an Office at will, and also 40 *l.* fee to him for his life, *pro officio illo*; in this case if he put him out of the Office, the fee shall cease. If a Rent be granted for a way, stop the way, and the Rent shall be stopped. If an Annuity be granted *pro consilio*, or *pro servitio impendendo*, if the Counsell or the Service be with-drawn, the Annuity is determined. If the King have a Ward by cause of a Ward, and make Livery to the first Ward, now the second Ward shall not sue Livery. It is not a principall challenge to a Juror, that he hath married with the Mother of the party, if she be dead without issue, for the cause of favour is removed. If one give a man a wound the first of *May*, and the King the second of *May* pardon to him all Felonies and Misdemeanors, and the third day of *May* the party dyed of this stroak, by this pardon the felony is discharged: But yet *Sublata una causa, si alia remanet non tollitur effectus*. In case of Socage Tenure, whereas in times past the Tenants did use to eare the demeans of the Lord with their Plows, the which service was afterward changed into an Annuall Rent by consent of the Lord and Tenants; in this case notwithstanding the Lord do alien his Demesns, and have no Land to plow, yet the Tenants shall pay their Rents yearely to the Lord. Where one doth hold by Rent for Castle-gard, although the Castle fall, yet the Rent doth remain: And albeit the Religious houses be dissolved and suppressed, yet the money that is payd in liew of Proxies by the owners of those houses remain. *Coo.* 11. 81, 48, 49. 1. 98. *Plow.* 393. *Dyer* 13. *Coo. super Litt.* 204. 208. 5. *Edw.* 4. 8. *Dyer* 76. 9 *Ed.* 4. 20.

4. 29. 14. Edw. 4. 14. Dyer 2. Davis Rep. 1. 13. Ed. 4. 10. 34 H. 7. 2. Pl. 401. Davis Rep. 3. Co. 4. 88.

A. leases white acre to *B.* for life, *B.* doth make waste, *A.* doth grant the Reversion to *C.* *B.* doth attorn, *A.* cannot have an Action of *Waste*, because the Reversion, in respect of which it is given is out of him. So if there be Lord and Tenant, and the Tenant alien in *Mortmain*, and then the Lord grant the Seigniory to a stranger, and the Tenant Attorn; in this case the Grantor shall not enter for the *Mortmain* (albeit it be within the year) because the Seigniory in respect of which the entry is given, is out of him. *Perk.* §. 20.

Vide Fairs, Leases, Averment, Nosme, Grants.

Certainty and Incertainty.

CErtainty is the plain, cleer, and distinct setting down of things: And is said to be the mother of repose, and is opposed to Incertainty (*i*) when a thing is so ambiguously and doubtfully set down, as one cannot tell how to take or understand it, and this is said to be the mother of *Contention*. And this *Certainty* is of three sorts.

1. To a common intent, and that is sufficient in a Barr in pleading, which doth defend the party and excuse him, and this is sufficient in Deeds.

2. To a certain intent in generall, and this is required in all Counts, Declarations, Replications, and Pleadings of the Plaintiff, and Indictments to convince the Defendant.

3. To a certain intent in every particular: And this the law doth altogether reject; for *Nimia subtilitas in jure reprobatur, & talis certitudo, certitudinem confundit.* Co. 5. 121. *Plow.* 25.

The questions of *Certainty* and *Incertainty* grow upon Records: as Writs, Counts, Pleas, Replications, Verdicts, Offices, Returns, Fines, Recoveries, and such like: And writings: as Feoffments, Gifts, Grants, Leases, Wills, and the like: And Tenures, Warranties, and other things: But in all these things this Rule is admitted, *Id certum est quod certum reddi potest*; And therefore if one lease his Land in *W.* rendring Rent for every acre twelve pence, this is a good render enough

enough, for this may be made certain. So if one hold his Land of his Lord, to ſheare all the Sheep depaſturing in the Lords Mannor, this is good a Tenure, for here is a certainty in an uncertainty. *Plow.* 6. 7 *Ed.* 3. 38. *Coo. ſuper Lit.* 96.

When and what certainties requiſite and where uncertainty will hurt or defeat.

A convenient certainty is required in Writs, Declarations, and Pleadings, and eſpecially in Writs, more then is in Writings; for if a Writ be abated for Incertainty, the Plaintiff may have another Writ; but if his Deed be avoided for Incertainty, he cannot have a new Deed at his pleaſure, *Coo.* 11. 25. *Coo.* 5. 121. *Dyer* 84.

If the King grant by Patent, *Cognicions de plees*, and ſay not *ubi*, nor *coram quo*, this is it ſeems voyd for Incertainty, *Br. Patent* 100.

In Record.

If an Action of Debt be brought againſt Executors, and they plead they have fully adminiſtred, *&c.* and the Jury find they have enough in their hands, and ſay not to what value, this Verdict is void and inſufficient for incertainty, 40 *Ed.* 3. 15. *Coo.* 9. 74. *b.*

In a Verdict.

Writings are ſomtimes void for incertainty in all, and ſomtimes in part only, and ſomtimes not; but the Incertainty may be holpen and made certain by Averment, or other means: And this Incertainty is ſomtimes in perſons, and ſomtimes in things; As in a Grant, in the perſon of the Grantor, or Grantee: In the thing granted, either in reſpect of the place where it is, the quantity or quality of the thing, or name wherby it is called, ſomtimes in the eſtate, ſomtimes in the time, ſomtimes in the manner; As if *I. S.* by the name of *I.* (without any Sur-name) do grant, or give, or take by this name, this is void by Incertainty: So if the party be named by his Sur-name only, without any Chriſtian name. So if a Grant be, *To the Church-wardens of* S. without any more, or *to God, to Church, or Poor*, or to three or four of a Pariſh, not naming them, or *to one of the Sons of* I. S. and he hath many Sons, or *to him that ſhall be the firſt Son of* I. S. and he have then no Son, or *to the Monks of ſuch an Abbey*, or to *I. S.* or *I. D.* in the Disjunctive: All Grants made after this faſhion are void for Incertainty. *Perk. Sect.* 99. *&c. Plow.* 6. *Coo.* 8. 155. *Perk. Sect.* 34. 35. 36.

In Writings.

If I grant to one so much wood in such a place, as I can spare, or can be spared; or if I have a Wood of 100. acres, and grant to one ten acres of it, and do not say where, or what part of the Wood; or if I have a Mannor, and grant the ten acres out of the Mannor, but do not say where: Or if twenty Tenants hold of me by the Rent of twelve pence a peece, and I grant ten shillings to perceive out of these Tenements, or ten shillings parcell of the twenty shillings; or if I grant a Corody, or Estovers, and say not where, nor what in certain; or if I grant Land, and say not in what County nor Parish. In all these and such like cases, the Grant will be void for Incertainty, *Dyer* 91. 281. 9 *H.* 6. 12. 9 *Ed.* 4. 11. *Finches Ley.* 13.

If I grant to two men *& heredibus*, and do not say [to their Heirs.] And if I be possessed of a tearm of years, and grant all the residue of my Tearm, which shall be to come at my death; In all these cases it is void for Incertainty, *Coo.* 1. 55. *Kelw.* 108. *Plow.* 520. *Broo.* 417.

When not, but may be holpen by Averment or Election.

It is not necessary one should set down the certainty of a thing in pleading, when either it is not possible so to do, or it is a thing out of his knowledge, or unto which he is a stranger, that doth plead it, or of which in common presumption he can have no certainty, *Plow.* 128. *Coo.* 4. 89.

If a Fine be levied to *I.S.* the Son of *W.S.* and he have two Sons of that name, this may be holpen by Averment, and is good enough.

In Writings.

If the King by his Letters Patents grant to another all the Mannors and Advowsons that did belong to the Priory of *H.* or all the Mannors and Advowsons that were *I.S.* which was Attaint, *&c.* these be good Grants; although it be not set down in what County it lye, 32 *H.* 6. 20. *Coo.* 9. 47.

If the Duke of *Buckingham* by that name, be Grantor or Grantee in a Grant, this is good and certain enough, without any Christian or Sur-name, *Perk. Sect.* 36.

If the name of the Father be *I. S:* and the name of the Son *I.S:* also, and one of them grant by the name of *I.S:* without any addition or distinction, this is good enough, *Perk. Sect.* 37.

If an Abbot had granted by the name of his Foundation, this had been good.

If

If a Grant be to the Bishop of *Worcester*, without any more, this is good enough, *Perk: Sect.* 45:

If one grant to the first Son of *I.S.* without any more addition, and *I.S.* have two Sons, this is good enough; *Perk: Sect.* 54.

If an Estate be granted to *I.S.* the Remainder to him that shall come the next morning to *Paules*, if *I.S.* the Grantee do live till then, and one do come there that is capable; this is a good Remainder, and certain enough. So if the Remainder hath been limitted to him that *I.S.* shall name within three dayes, if he do name, this is made certain, *Perk: Sect.* 36.

If a Lease be made to a Husband and Wife for one and twenty years, the Remainder to the Survivor of them for one and twenty years: Or a Gift in tayl be made to the Husband and Wife and the Heirs of the Survivor of them, this is good enough, *Co.* 10. 51.

If one grant his Mannors of *A.* and *B.* and say not in what County or Parish: Or Lease all his Land in the Parish of *A.* and say not in what County; or lease or grant all his Land descended to him from his Father, without more; or grant another a Robe, or a Rent of twenty shillings, or one of his Horses in his Stable (having many there) or twenty loads of Ashe, or of Oke in such a Wood; these Grants are good enough, and may be made certain by election: So if one grant to another so many Trees in his Wood as *I.S.* shall say may be spared, *Co.* 9. 47. *Plow.* 191. *Co.* 2. 37. *Dyer* 91.

If I make a Lease to another for so many years as *I.S.* shall name, this is good, after he hath named: So if I make a Lease to begin after the surrender, forfeiture or other determination of a former Lease, this is certain enough: So if I make a Feoffment to one of two acres of Land, *Habendum* the one for life, the other in tayl, this is good enough, *Plow.* 6: *Co.* 6: 36: 8: 56: *Co.* 2. 37:

If one bind himself in an obligation, to pay me all such money as his Brother oweth me; this is certain enough, for that by reference and averment it may be made certain, *Morgan verf. Johnson B. R. p.* 39. *Eliz.*

Vide

Vide Rents, Statutes, Judgments, Conditions, Warranties, Grants, Joynt-tenants Baron & Feme.

Charge.

IT is an act done by a man, binding him, or that which is his to the performance therof, and making him, or it, or both subject thereunto, *Vide Rent-charge.*

Charge and discharge.

Note, that Lands may be charged divers waies, as by Grants of Rent out of it, by Statutes, Judgments, Conditions, Warranties, and the like; and may be divers waies discharged again: For all which see much in other Titles, *Lit. Sect.* 648. & *Co: super Lyt:*

Where and in what case a charge shall be good in its creation, and by what meanes Lands may be charged, and what Estates shall be lyable to charge, and how long, where not.

And it is a Principle, that every Land in Fee-simple may be charged in fee by one way or other. *Lit: Sect:* 648.

Where a grant of Land will be good in respect of the parties Grantor, Grantee, thing granted, or the manner of the Grant, there a charge upon the same Land will be good also: As if any body corporate or politick, Dean, and Chapter, Mayor, or Comminalty, or the like, charge their Land by their common Seal, and common consent, it is good; So if the Patron, or Parson, and Ordinary, or in time of Vacation, the Patron and Ordinary charge the Land by their Grant, this would have bound the Land by the common Law: But in case where a Grant of the Land it self would be void or voidable, in respect of the parties, Grantor, Grantee, or thing granted, or the manner of the Grant; there a charge upon the same Land will be void also, and the Land shall never be subject to it: As if an Infant, Feme Covert, Dean without his Chapter, Mayor without his Comminalty, or the like, grant a Rent out of their Land, this is void; But a Dean, or Mayor in such cases may charge their own persons, and their own Lands they have in their own right. So if one grant a Rent to a person incapable; or if one by his Deed, grant a Rent out of Land, to which he hath no right, nor possession, or if he have the possession, yet hath no right, or if he have right, yet hath

no

no possession, this will not charge the Land, albeit the party do after get a right to it, or the possession and the right come together, *Perk: tit: Grants*, 14 *H*.8.10. 5 *H*.5.8.

Where the right of Fee-simple is perpetually by Judgment of Law, in Abeyance, without any expectation to come in *esse*, there he that hath this qualifyed Fee *concurrentibus his quæ in jure requiruntur*, may charge the Land, and this charge is good. As in the case of the charge of Parson, Patron, and Ordinary before the statute: But where the Fee is in Abeyance, and may come in *esse* every hour, there it cannot be charged till it come: As if a Lease be made for life, the Remainder to the right Heirs of I.S. the Fee-simple cannot be charged till I.S. be dead, *Coo. super Lit*: 343.

Lands intailed also may be charged in Fee, if the Estate-tail be cut off by Fine or Recovery; for if a Tenant in tail grant a Rent-charge, and after suffer recovery, levy a Fine, or make a Feoffment, this charge shall be alwaies good against the Recoverer, Conusee, or Feoffee: And so if he make a Lease; and so also in some cases where the Estate doth continue; As if a Disseisor make a gift in tail, and the Donee in consideration of a Release by the Disseisee of all his Right to the Donee, granteth a Rent-charge to the Disseisee and his Heirs proportionable to the value of his Right, this will bind the Issue in tail. So if *A*. devise Land to *B*. and his Heirs of his body, the Remainder to *C*. on condition that *B*. shall grant a Rent-charge out of it to *D*. in fee, and *B*. grant the Rent accordingly this is good to bind the Estate tail and the Remainder also, as was adjudged in *Duttonet Ivianes case*, *M*. 15. *Jac*: *B*. *R*.

If a man have a moveable Inheritance, as in a great Meadow, two acres by division or election every year by Custom, so that one year he hath it in one place, and another in another; this may be charged well enough, and the charge will follow the Land, *Coo: super Lit: fol*. 4. *a*. 343. *b*.

When all those that have Interest in the Land joyn in the grant of a Rent, so that the Grant is made *Concurrentibus his quæ in jure requiruntur*, the Grant is good for ever; As if at the common Law Donor & Donee in tayl had joyned in a Grant of a Rent, & the Donee dy without Issue, the Donor shal hold

the

the Land charged: So if the Mortgagor and Mortgagee joyn in the grant of a Rent charge, and after the Mortgagor enter for the Condition broken, yet the Rent doth continue. So if a Disseisor or his Heir grant a Rent-charge, and the Disseisee confirm it, this now is unavoidable when he doth recover the Land: So if Feoffee on Condition grant a Rent charge in fee, and the Feoffor confirm, and after the Condition is broken, and the Feoffor enter, he cannot avoid the Rent: So if Lessee for life charge the Land with a Rent in fee, and the Lessor confirm it, this is a good Rent for ever, albeit the confirmation be made after the Tenant for life: So if Tenant for life, on condition grant a Rent-charge in fee, Lessor confirm the Grant, the Condition is broken, the Lessor doth enter, *Coo:* 1.147.149:10.49. *Coo: super Lit:* 300.121.301. 14 *As. pl:* 14. 14 *Ed:* 3. *Ass:* 109.

If one have a Possession and an ancient Right, and he grant a Rent-charge, this shall issue out of both: And therfore if Tenant in tayl lease to *A.* for life, and after he Grant a Rent-charge to *B. A.* dyes, he shall not avoid the charge: So if *A.* Tenant in tayl infeoff *B:* on Condition to the use of *A.* in fee, *A.* acknowledg a statute which by the statute of 1 *R.* 3. *c.* 5. is extended (*A.* having then but a Rent and a Condition) the Condition is broken by which the Feoffment is avoided, and he seised of the intayl again, yet *A.* shall not avoid the extent; And so if he had granted a Rent-charge, *Coo:* 2. 14. *Coo:* 1.147, 148. 11 *H.* 7. 21.

He that hath but a Remainder or Reversion of Land may charge it, and the charge is good in respect of the possibility, and the Distress shall fasten on the Land when it comes in possession. *Coo.* 5:2: 1. 62. and not before, *Broo: charge* 11. 30.

And therfore he in the Reversion Expectant upon an Estate for life, may charge the Land. And if *A.* lease to *B.* for years, and after *A.* doth grant the Reversion to *C.* rendring Rent, *A.* cannot distrain during the Tearm *per Moyle*, but *per Danby & Nedham*: If the beasts of *C.* come upon the Land *A.* may distrain them; but *Moyle al contra*, but by him if *C.* pay the Rent once to *A.* if it be a year after. *A.* may have an Assise, *Broo: distress* 48. but after the tearm is ended *A.* may

without

without question distrain for all the Arrearages, *Coo:* 5. 2.

If *A.* lease to *B.* for life, and then grant a Rent-charge to *C.* *A.* dye, *B.* being his heir, in this case *B.* shall hold the Land discharged during his life, but otherwise it is if he had purchased the Land, *Per Nedham* 9. *Ed.* 4. 18.

If *A.* Lease to *B.* for life *A.* charge the Land, *A.* doth disseise *B.* in this case *A.* shall forthwith hold the Land charged 5 *H.* 5. 10.

If the Lessor grant a Rent-charge, and the Lessee surrender, the Lessor shall forthwith hold the Land charged, *Broo Charge* 10.

If *A.* be Tenant by Elegit, and *B.* having the Reversion doth grant a Rent-charge out of it, and after *B.* doth release or confirm to *A.* for life; In this case *A.* shall hold it subject to this charge, 31 *Ass:* pl. 13.

A. being Tenant for life the Remainder to *B.* in fee, or the Reversion to him in fee, *A.* doth grant one Rent-charge out of the Land and *B.* doth grant another Rent-charge, *A.* surrender: In this case *B.* shall hold the Land charged with both the Rents, *Coo:* 9. 107.

If one have divers Estates in Land he may charge or grant them, *Dyer* 10.

If a Lord grant a Rent out of his Mannor, in which are Copyholds, and after one of the Copyhold Estates fall into the Lords hand, and after this is granted away again according to the Custome; now it seems the charge shall not light upon this which is so granted away, but upon the residue of the Mannor, yet *see Dyer* 271. *Coo.* 4. 24. 64.

If one grant a rent-charge out of land, that is in lease for years or life, it will fasten upon the land as soon as by any means it come into the hands of the Grantor, and not before: But it may be the person of the Grantor may be charged before; See before; And he that is in possession, and he that is in reversion or remainder of the land may both charge the land, but the charge of the Tenant in possession shall be preferred, 5 H. 5. 8. *Coo:* 9. 107. *Dyer* 10.

If one Joynt-tenant grant a rent-charge out of his land he holdeth in Joynt-tenancy, the beasts of any of the other Joynt-

tenants shall not be distrained, neither shall they be charged hereby; But the beasts of the Grantor may be distrained upon the land, but if the Grantor survive the rest of his companions, all the land is chargable, but if he dye before the rest, all the land is discharged: So if one Joynt-tenant enter into a Statute, or suffer a Judgment, his part onely shall be extended and subject to the charge whiles his companions live: But if he Survive, then all shall be in execution, unless his companions did sever the Joynture in their life-time, and if he dye before his companions, yet the execution is not discharged of his part, 7 H.6. 1. *Perk: Sect:* 183. 11 H.6.33. *Broo: charge* 39. *execution* 148. *Coo: super Lit:* 184. 13 H.7.22. *F: N. B.* 20.

If a Mayor alone, or a Dean alone, will charge the land they have in Common with the Corporation, none of the Corporation shall be charged, nor the land; but the person of the Dean, or Mayor himself.

If four be bound in a statute, or Recognizance, and one dy, the three that survive shall not be charged with all, but those three with the Heir of the fourth together equally, 29 *Ass: p.* 37.

If two be bound joyntly in an Obligation, and one dye, or be outlawed, it seems the other shall be charged with the whole: So if two be Accountants, and one dye, or be outlawed,; So if two warrant land, and the one hath nothing to render in value, it seems the other must answer all: But if two men make a Feoffment in fee with warranty, and the one dye, the Feoffee cannot charge the Survivor only, but the Heir of him that is dead also, *Broo: Joyntenants* 5.16.21. 9 *Ed.* 4.24. *Coo: super Lit:* 386.5.14. 19 H 6.55.

If a man seised of lands in fee, and possessed of a Tearm for many years, grant a rent out of both for life, in tayl, or in Fee, with clause of distress out of both, this rent doth issue only out of the free-hold, and the lands in lease are only charged with a Distress: But if it had been granted only out of the lands in lease, then that land had been charged during the Tearm, if the Grantee live so long, *Coo: super Lit* 147. *Coo:* 7.23.

If one have divers Estates in the land, and grant or charge it,

it, this shall go out of all his Estates; As if *A.* be tenant for life, remainder to *B.* in taile, remainder to *A.* in Fee, and *A.* grant a Rent-charge and dye, *B.* dyeth without issue, the heire of *A.* shall be charged. So if *A.* be tenant for life, remainder to *B.* in taile, remainder to *A.* in Fee, and *A.* acknowledge a Statute, and dye, and *B.* die without issue, the Heire of *A.* shall be charged, as was held in *Pethowse & Cranes case: M* 36. *Q.* 37. *Q. Coo. B.* So if *A.* be tenant for life, remainder to *B.* for life, remainder to *A.* in fee, and *A.* makes a feoffment, in this case all his Estates pass: 24. *Ed.* 3. 70. *Brown. Dove* 55. So if *A.* tenant in taile, the remainder to him in taile levie a Fine, all his Estates pass and are barred. *Coo. super Lit.* 372.

So if *A.* be tenant for life on Condition to have fee: *A.* lease to *B.* for years, *A.* performe the Condition, yet he shall not avoid the Lease for years. So of a Rent. But otherwise it is in case of the King. *Coo.* 7. *Parl.* 2. 14.

REgularly when the Estate is gone, upon which the charge is, the charge is determined and defeated. As for examples

Where and in what case a charge good in its creation shall after be defeated and determined and the Land discharged.

If one be seised of Land, and take a wife, and after grant a Rent, or Common, out of the Land, or enter into a Statute, and it be extended during the Husbands life, and after he dye, and the wife is endowed of a third part of the Land charged by suit, now by this, the charge is determined as to that third part, and that part is discharged of it. But if one have three Mannors, and charge them all, and dye, and she accept of one of them, she shall hold two parts of it charged: *Coo. super Lit.* 349. *F. N. B.* 150. *a.* 17. *Ed.* 2.

If a man have a tearm of years in Land, in the right of his wife, and he grant a Rent-charge out of this Land and dye, now by his death, the charge is determined, and the wife shall hold it discharged: But if he survive his wife, the charge is good during the terme: 9. *H.* 6. 52. 7. *H.* 6, 1. 9. *H.* 6. 52.

By alteration of the Tenant of the Land to be charged.

If a Tenant in taile grant a Rent-charge out of the entailed Land (unless it be in such a speciall case as is above) and then dye, the charge is determined, and the Issue shall hold it discharged

charged: so shall the Donor also, if the tenant dye without issue, and the Land revert to him: And although the issue after his entrie make a Feoffment, and take back a new Estate; yet the charge doth not revive. 12 H. 4. 7. 44. Ed. 3. 21. 14. *Ass. Brow. Charge* 20.

If one devise that his Executors shall sell his Land, and the Heir after his death, enter and charge the Land; and then the Executors do sell it; now the charge is defeated, and the vendee shall hold it discharged. 14. H. 8. 10.

If a Feoffee, or lessee, on condition charge the Land, by a Grant or a Statute, and after the Condition is performed, and the Feoffor, or Lessor, reenter; now he shall avoyd this charge, for the Land is discharged of it. *Perk. Sect.* 840.

If a Disseisor charge the Land he hath by disseison, and after the disseisee reenter, or recover the Land: now the disseisee shall hold it discharged and is not subject to the charge of the Disseisor. *Coo.* 11.

If a Lessee for life, or years, make a Feoffment in Fee, and so commit a forfeiture, and after the Feoffee, charge the Land by grant, Statute, or otherwise, and then the lessor enter for the forfeiture: Now in this case the charge is gone; and the lessor shall hold it discharged: So if a Lessee do wast, and cause a forfeiture; and after the wast, and before the Recovery of the Land charge it, and after the lessor recover it; the lessor shall avoid his charge. *Lit. Sect.* 476. *Perk. Sect.* 844.

If the Husband charge the land he hath in Fee, in the right of his wife: And after he and his wife levie a Fine of this land: now the Conusee of the Fine shall hold it discharged, and the charge is determined. *Coo.* 1. 66.

If there be tenant in tayle in possession; the Remainder in tayle or in Fee to *I. S.* and *I. S.* grant a Rent or otherwise do charge the Land; and after the tenant in tayle in possession suffer a Recovery of the land: now hereby all the charges by him in Remaynder are defeated. *Coo.* 1. 61.

By other matter ex post facto.

If one charge his Land with a Rent, or Statute, and after make a gift of it in tayle, and the tenant in tayle make a Feoffment of the land to the Grantee of the Rent, or him that hath the Statute extended and the issue recover the Land in

a For-

a *Formedon*: now it seems this issue may avoyd this charge, because it was once extinct. For the charge of tenant *en taile*, *See Estates*. 19. *H*. 6. 45.

If a tenant in tayle maketh a Feoffment to his Heir inheritable by the tayle, being within age, and after being of full age (living his Ancestor) he charge the Land, and after the tenant in tayle dyeth: now the Land is hereby discharged, and he shall avoyd his own grant, because he is Remitted: So if the Heir of the disseissee do disseise the Desseisor, and grant a Rent charge, and then the disseised dyeth; the grantor shall avoyd his own grant for the same reason: So if the Father disseise the Grandfather, and granteth a Rent charge, and dyeth, now the entry of the Grandfather is gone, if he dye, the sonne shall avoyd the charge by the Remitter. *Lit. Sect*: 660. *Coo: super Cro*. *By Remitter.*

If a Tenant in tayle charge the Land, and after levy a Fine, or suffer a Recovery of the Land to his own use; this doth confirme the charge, and it shall continue: But if he sell the Land away by Fine, or recovery, it seems the Conusee or Recoveror shall hold it discharged: *Coo*: 1. 61: *Where and in what case, not but the charge shall remain not with Standing the alteration of the tenant.*

If tenant for life charge the Land, and then enfeoffe him in remainder; in this case he shall hold it charged during the life of the tenant for life and no longer, for this is a surrender: *Brow. charge*. 6.

If a man have an Office of skill for his life, to which there is a house belonging; and he chargeth the house with a Rent during his life, and after he commit a forfeiture, yet the charge shall continue during his life, for he that takes Land by advantage of a condition in law must take it with his charge: *Coo: super Lit*. 234.

If one have a Lease for years, or life, of Land, and grant a Rent out of the Land, and after surrender his Estate, and determine them, yet the charge shall continue as long as the estates should have endured, if they had not been surrendred. *Dyer* 10. *Perk: Sect*: 844. *Coo*: 1. 67. 8. 145.

If one make a lease for years, or life, and after grant a Rent out of the Land, and after the lessee for years surrender: the lessor cannot avoyd this charge; but now it will take effect

presently; otherwise it will not take effect untill the Lease be determined. 5 *H.* 5: 8. 38 *Ed.* 3. 4.

If one Joynt-tenant charge the Land, and after release to his companion and dye, the survivor shall hold it charged, but if it had come to him by survivorship *contra Co.* 6. 76.

If a man seised in Fee simple that hath a wife make a Feoffment in Fee on condition, and dye, and the Feoffee on condition endow the wife of a third part; and she charge this, and after surrender or grant her Estate to the Feoffee on condition; now he cannot avoyd this; but must hold it charged during her life. *Perk. fol.* 822.

If there be tenant for life, the Remainder in tayle, Remainder in Fee to the tenant for life and the tenant for life charge the land and dye, and the tenant in tayle dye without issue: now the Heyr of the tenant for life cannot avoyd this charge, but the Land will be charged. 5 *Ed.* 4. 2.

If the Kings tenant charge his Land, with, or without the Kings licence, and after the Land come to the King by attainder, or escheat, or the like; now in this case, the King must hold it charged, and cannot avoyd the charge 3 *Ass. p.* 1. *Stat.* 2. *El.* 3. *P. & M. cap.* 8.

If tenant for life charge the Land, and after make a Feoffment to a stranger, or doth wast whereby it is forfeit and recovered; here he in reversion must hold it charged, during his life; And if the lessee grant one Rent, and he in Reversion another; now he must hold the land subject to, and charged with both Rents, but the grant of the lessee for life shall be preferred. 50 *Ed.* 3. 6 *Co.* 1. 67. *Dyer.* 10. *Co.* 9. 107; *Co.* 10. 49.

If the Husband and Wife during the Coverture grant a Rent by Fine out of Land; and after his death shee is endowed of part of it, now she must hold it charged with the Rent.

If there be tenant in life the remainder in taile to *B.* the remainder in taile to *C.* and tenant for life, and *B.* levie a Fine *sur grant*, and render of Rent to the tenant for life, and after *B.* the first tenant in tayle dye without issue, and the land go to *C.* he must be charged still with this Rent to the tenant for life. *Co.* 1. 76.

If Tenant in tayle make a Lease for life, and he grant a Rent-charge out of the Reversion, and after tenant for life dyeth, whereby the Grantor becometh tenant in tayle againe, and the reversion defeated: yet the Rent-charge is good and doth continue against him, but not against his issue. 11. *H.* 7. 21. *sup. Lit.* 349. *By other matters.*

If assent be issuing out of a Mill, or house, and the Mill, or House fall, yet the charge doth continue upon the soyle: 9. *Ed.* 4 20. *Coo.* 1: 113. 10. 48.

In all cases when any Executory thing is created by Deed, there something by consent of all persons, parties to the creation of it, may be by their Deed defeated and discharged; And therefore by a defeasance of all the Covenant that doth create a future power of Revocation as the power it self created may be defeated: And therefore Warranties, Rents, charges, Recognizances, Annuities, Covenants, Leases for years, uses at Common Law, and such like things and may by muuall consent be avoyded. And every right, title, and interest in *præsenti*, or *futuro* by the inquiry of all that have the right may be barred and extinct. *See Cases Coo.* 10. 49. He that hath Land in extent upon an Execution, upon a Statute, marchant or Judgement assigne over his interest, and after release to the Conusor, or to him against whom the Judgment is had, this doth discharge the Execution. 24. *Coo. B. Moore & Moons case.* So if he acknowledge satisfaction, *[illegible] & Eliners case.* or in this case, the party may have an *Audita Querela* against the Assignee, as was adjudged in *Flower & Elgars case, Pasch.* 7. *Car. B. R.* *How a charge may be discharged.*

Taxes and Rates are the appointing, and setting down, how much every one shall pay and be charged with. *Stat.* 43. *E. c.* 3. *Taxes & rates*

The Justices of the Peace at the Sessions must set a rate or summe upon every Parish, to be paid weekly, towards the reliefe of sick, hurt, and maimed Soldiers, and Mariners, but no Parish must be rated above ten pence, nor under two pence weekly, and if there be fifty Parishes in the County, not above six pence a week: And this summe so taxed, shall be yearly assessed, by the agreement of the Parishioners within themselves, or in default thereof, by the Church-wardens and pet- *Maimed Soldiers & Mariners.*

tie

tie Constables, or the more part of them, on default thereof by the Justice of the Peace next to the Parish. And if the party taxed refuse to pay the mony taxed, the Churchwardens and petty Constables, or either of them, or in default of them the said Justice may levy it by sale of his Goods. *See more in Treasurer.*

The Churchwardens and Overseers of every Parish, or the greater part of them, may by advice of two Justices raise, weekly by taxation, of every mans Land within the Parish money, and charge men towards the relief of the poore. (See more in Poore) and every man must pay according to that rate, or Complaint at Sessions for relief. *Stat. 43 Eliz. cap. 2.*

Prisoners of the Kings Bench, and Marshalls.

The Justices of the Peace at the Sessions must set down what must be paid by every County quarterly towards the relief of the poor Prisoners in the Kings Bench, and Marshalsie, and such Hospitalls and Almes-houses as shall be in the said Kings Bench or Marshalsy, and in the same County, and it must not be less then twenty shillings out of every County yearly to each of the said Prisons: which summes ratably to be assessed upon every Parish, the Churchwardens of every Parish must collect and pay to the High Constable of the division. So that it seems this taxation must be made by agreement between the Parishioners amongst themselves, and that if any refuse to pay, that upon complaint the Justices of the Peace at their Quarter Sessions may compell him. And if any be over-rated, that he must be relieved there. *Stat. 43. Eliz. cap. 2.*

Prisoners of the common Gaole.

The Justices of the Peace at their Quarter Sessions may rate and tax every Parish in the County weekly, as they think fit, so as it exceed not three pence a week every Parish towards provision for the relief of Prisoners in the Common Gaole. And every Sunday the Church-wardens must levy it, and pay it quarterly to the head Officers of every hundred or place to be paid in at the Quarter Sessions. And this also it seemes must be taxed upon the Inhabitants by agreement amongst themselves, or else by order of the Sessions. *Stat. 14. Eliz. cap. 5.*

Four

Four Justices (whereof one of the *Quorum*) may tax the Counties of *Glocester* and *Monmouth*, according to their discretion, for and towards the Reparations of *Chepstow-bridge*, and every hundred must pay according to the Rate. But they must rate every man in particular by agreement, or by order of the Sessions. *Stat. 3. Jac. cap. 23.* *Chepstow-bridg.*

Such Justices also may rate the Inhabitants of any Towns, or Villages near unto any decayed Bridge on the High-wayes, when it is not known who ought to repaire it, and the persons so taxed must pay it accordingly. *See Statute of 22 H. 8. cap. 5.*

The Rates for the Church are to be made by the Church-wardens, and the greater part of the Parish present, after solemn notice given in the Church upon every Inhabitant and occupier of Lands, in the town or place, for mony towards the Reparation of the Church, and other matters belonging thereunto, and according to that rate, men must pay, or they will be compelled to it: *See Church-wardens. Cro. 5. 67.* *Church.*

How men shall be taxed and rated for the reparation of the Sea banks. *See Commission of Sewers.* *Sewers.*

The Rates of Subsidies, and fifteenths are to be made according to the statutes, whereby they are granted, if they set down any order of taxing, otherwise according to the ancient use. *See Subsidies. Stat. 9. H. 4. cap. 7. 1. Ed. 3. cap. 6.* *Subsidies and Fifteens.*

CHARTERS are Writings, Deeds, Evidences, and Instruments made from the King or any other man, to another, upon some estate passed or conveyed between them of Lands or tenements, shewing the place, name, and quantity of Lands, the Estate, time, and manner of doing thereof, the partyes to the Estate delivered and taken, the witnesse present at the same, with other circumstances. The word Charter doth usually signifie the Kings Patent, Which see in *Patents. Termes ley Co. 1. 1. 34. H. 6. 1.* *Charters.*

And these are some of them called *Principall*, 1 Such as do concerne the title of the Land, and are the cheife strength thereof. And others are said to be Accessary: (2) such as

concerne the possession only, as Court Rolls, and such like. Coo. 1. 1.

To whom they belong, and what persons shall have them.

Charters are the sinews and strength of mens Inheritances, and therefore for the most part, he whose possession is made by them shall have them, and they are as Incidents, or *Commitants* to the Land, to go and pass with it: As a man seized of Lands in fee, in possession or Reversion, and hath divers Charters, Deeds and evidences, some with warranty and some without, and maketh a Feoffment in Fee, without warranty. Now the Purchaser shall have all the Charters, Deeds and evidences, as incident to the Land, and though they be not granted by the Deed, *ratione terræ*, to the end he may the better defend the Land it self, having no warranty to recover in valew, and the Feoffer being not bound to warrant, hath no use of them. So if there be a warranty in the Deed; If there the Feoffor grant the Deeds, there the purchasor shall have them also, So also if the thing sold be such a thing as doth lye in grant, as Common Rent, &c. If the seller or grantor do never grant the Charters that do concern the Land, and although there be a warranty in the Deed, yet the Purchasor shall have all the Deeds that do concern the Land. But if that a man be seised of Land in possession or Reversion and have divers Charters, some conteyning warranty, and some not, and he make a Feoffment of this Land, and warrant it to the Feoffee and his Heyrs, so that he is bound to render in valent, and there are no words of grant of the Charters in this deed: Now in this case, forasmuch as the defence of the title is at the Feoffors perill, therefore he shall keep all the principall evidences that are materiall for the maintenance of the title of the Land; As all the Deeds which comprehend warranty, whereof he may take advantage; and such as may serve him to deraigne the warranty *Paramount*, and such like, but such as are accessory only, which concerne the possession and not the title, those the Feoffee shall have. As if *A.* enfeoffe *B.* with warranty, and *B.* enfeoffe *C.* with warranty; though *C.* may vouch *A.* upon the first warranty, yet he shall not have the first Deed: And yet if in this case a stranger have

them

them, the feoffee may recover them against him: So if *A.* enfeoffe *B.* with warranty; and *B.* enfeoffe *C.* by the word *Dedi* (which implyeth a warranty for life of the Doner) *B.* shall keep the Charters during his life, but his Heir shall not keep them afterwards. *Coo.* 1.1.44.3. *Ed.*3.11 *Ed.*3.17.19. *H.* 6.65.34 *H.*6. *Coo.* 11.50.10. *Ed.*4.9.18. *Ed.*4.14.6. *H.*7.3.6. *H.*7:33. *Coo. super Lit. fol.* 6.

What the word Dedi implyeth.

If a Lord come to Land by Escheat, he shall have all the Charters belonging to the Land so escheated to him. *Coo.* 1.1.

Such Charters as belong to the Ancestor, the Heir shall have, though he have no land by discent. *Coo.* 1.1.

If one make a Feoffment to two, and the Heirs of one of them, and deliver all the Charters and Deeds to him that hath the Fee-simple of the Land, and he happen to dye before his companion: now his Heir shall keep all the rest of the evidences except the Deed of Feoffment, which the surviving Joyntenant is to have. *Coo.* 1.2.34. *H.*6.1.

If two Joyn-tenants be in by a defeasible title, and a Release is made to them, and one of them dye: now the survivor shall have that Release and all the rest of the writings. *Coo.* 1.2.21: *H.*7.33.6: *H.*7:3:

If a Feoffment be made to two without deed, and the writings be delivered to one of them, now the other shall not have them from him: So if I release to my two Joynt-Feoffees, and I release to them both, and deliver the deed to one, the other though he survive, shall not have it.

If I release to two Disseisors, and deliver the Deed to one, the other surviving shall have it. If the Disseisee release to the Disseisor, and he make a Feoffment of the Land, the Feoffee shall have the Release: But if a Feoffment be made to two without Deed, and the evidences that do concerne the Land are delivered to one, the other shall not have them: 34. *H.*6.1.6. *H.*7:3.

Vide *Property, Inrollments, Averment, Servant, Agreement, Assumpsit.*

Bargains and Contracts.

BArgains and Contracts are mutual agreements and Covenants of parties concerning some things each to other: And these are sometimes of and about Inheritances and Free-holds, and sometimes of, and about Chattels reall or personall. The first sort are called properly *Bargains & Sales*, and the last *Contracts* (of which last see more in *Agreement.*) But this also is sometimes called *Bargaine and Sale. Terms ley. Co. super Litt. 47. b.*

Bargain and Sale of Lands.

IT is when a recompence is given by both the parties to the bargain. As if one bargain and sell his land to another for money, here the land is a recompence to him for the money, and the money is a recompence to the other for the Land: And this is a good contract and bargain, and an estate for life at least passeth notwithstanding he doth not say, To Have and to hold to him and his Heyrs, and there be no livery of Seisin, or Attornment: But then if it be a Free-hold estate, there must be an Inrollment (which see *infra*:) And by this the Use would have passed at the Common Law, and the possession will now passe with the Use. *Terms ley. Plow. 301. Br. Conscience 25. Co 1. 87. Plow. 539. a.*

And note that all things that are grantable may be transferred from one to another by way of Bargaine and Sale: as Lands, Rents, Advowsons, Commons, Tyths, profits of Courts, *&c.* in Fee-simple, Fee-tayl, for life or years. Also all goods, and chattels reall and personall, as Cattell, Corn, Houshold-stuff, Woods, Trees, Wares, Merchandizes, Corn. Also one may make estates by way of Bargain and Sale upon Condition, as well as by Feoffment or otherwise. *Plow 81. Co. 7. 4. Dyer 90. 8. 9. 361. 27 H. 8. 5. 21. H. 6. 43. 11 H 4. 32.*

To make any estate of Land in Fee-simple, Fee-tayl, or for life to passe by way of Bargain and Sale, these things are required.

1 A consideration valuable or natural. (For in every Bargain and Sale, and Contract also which the Law will allow for good, there must be *Quid pro quo* (*i*) a consideration and cause meritorious more or lesse, (*i*) something must be paid or done by the one party, or at least bid and received by the other party.)

What things are requisite to make estates of inheritances or free-hold to passe, & what not.

2 The Consideration must be expressed in the Deed, or averred upon the Deed.

3 The Deed that doth passe the Estate, must be indented, sealed, and inrolled in one of the Kings Courts of *Record at Westminster*, or in the County where the Land doth lye before the *Custos Rotulorum*, two Justices, and the Clerk of the Peace, or two of them, according to the Statute of 27 *H.* 8. 16. And when all this is done, yet is not the Bargainee in actuall possession, nor can he bring any Action of Trespasse for any trespasse done upon the Land, untill he hath made his Entry, for untill that time he hath no more but a possession in Law. But it is not needfull there should be any livery of Seisin or Attornment upon the Deed. *Dyer* 91. 8. 336. 24. *Pl:* 305. 36. *Cook*, 7. 40. *b.* 94.

2 That the very words (*bargain and sell*) should be inserted in the Deed: For words equipollent, as [*alien, grant*, &c.] may serve as well.

3 That there be the word [Heyrs] by the Common Law: For as the Common Law a Bargain and Sale to one generally without the word [Heyrs] passed a Fee simple. 1 *Rep.* 87 *b.* 100 *b.* 27 *H.* 8. 5. 4 *Ed.* 6. *Br. Estates* 78. *T. H.* 8. *Br. Conscience* 25.

But at this day, and so ever since, the Statute 27 *H.* 8. only an estate for life passeth. 1 *Rep.* 87. *b.* 27 *H.* 8. 5. *b. Dyer* 169. *b. Coo. super Lit.* 10. *a.*

In *London* and other Cities and Burroughs they may bargain and sell their Land now, as they might have done before the Statute of Inrollment. *Crompt. Jurisd. de Courts*, *fol.* 13. *b.*

If one (in consideration of a certain summ of money paid) covenant to stand seised to the use of any person (whether of his blood or otherwise) that shall pay the same money, in fee-simple,

What shall be said to be a good bargaine, and sale of any freehold, or inheritance, and a sufficient consideration to raise a use, and what not.

fee-simple, fee-tayle, or for life: And this deed be inrolled according to the Statute: This is a good Bargain and Sale. *Coo.* 7.40. *Coo.* 8.94.

If one bargain and sell a Reversion by Deed enrolled, this is a good bargain and sale to passe the Reversion, though there be no Attornment. *Plow.* 433.

If one bargain and sell his Land in consideration of a certain sum of money expressed (whereas *revera*) there was no money paid.) Yet if this be inrolled, this is good to passe the land. *See uses. Dyer* 169.

If one for a competent sum of money bargain and sell land to another, this is good. *Dyer* 90. *b. See Crompt. Jur. Chancery Writs.*

But if one (for divers good causes and considerations) bargain and sell his Land by deed inrolled according to the Statute, yet *nihil operatur*: For there must be a sufficient consideration, and of this the Court must judge: But where there is no consideration, or a generall or particular consideration that is not good by Law, there an Averment will help it. *See Averment, Coo.* 1.176.

If one (in consideration that the bargainee is bound for him, and for divers other good causes) bargain and sell land, this is not good. *Ward* versus *Lambert, Pasch.* 37 *Eliz.*

How it shall be taken.

A. for ten pounds payd by *B.* bargains and sels his Land to *B.* and his Heyrs *Habendum* to the use of *A.* for life, the remainder in tayl to *B.* the remainder to the right Heyrs of *A.* this *Habendum* is voyd, for a use may not arise out of a use. *Dyer* 155. *a. b.*

Bargains and Sales, or Contracts what, of goods and chattels.

Bargain and Sale of Chattels reall or personall, is that which is commonly called a Contract, which is largely an agreement between two or more concerning something to be done, whereby both parties are bound each to other, or one is bound to the other: But strictly it is an agreement between two or more for the buying and selling of some personall goods, where by property is altered, but in this place it doth comprehend both. *Terms ley.*

These Contracts are of divers kinds: For some of them are in Fait or Expresse, and some of them are in Law or Implyed.

Those

Those in Fait are some of them Absolute, and some Conditionall: And both these also are sometimes in writing (of which see in Leases and Obligations and Covenants) and sometimes by word onely; And these also are sometimes accompanied or cladd with a consideration, & have *Quid pro quo* in them, which is the materiall cause of the Contract, when some recompence in Fait or in Law is given, which maketh it binding and actionable: And such a Contract is defined to be a Covenant or Agreement with a lawfull cause or consideration; for an agreement concerning personall things is a mutual assent of the parties, and ought to be executed with a recompence, or otherwise to be so certayn as to give action or other remedy for recompence. And sometimes they are alone, and without consideration, and then if it be by *parole*, and not in writing under hand and seale, it is defined to be *Nudum pactum*, (i) when there is no consideration or cause, but the covenant is self, *Ex quo non oritur actio*. They are also reall, (i) when they are about, and concerning land: As when a Lease is made of land for years, for money, or Rent; or I covenant to make a Lease of my Mannor for twenty pounds, to be payd me: And sometimes personall (i) when they are of an about a personall thing, as when one doth sell a horse for money.

Quid proquo.

Nudum pactum.

They are also executed, as an Accord with satisfaction (which see in *Accord*.) Or they are Executory, as when something is to be done or payd at a day to come. *Finch* 451 *Dyer* 3.96. 27 *H.* 8. 15. *Plow.* 30. 8. *Co.* 4. 4. *Pl.* 138. *Br.* 458. *Pl.* 1. *Dyer* 30. 14 *H.* 8. 19.

Those that are Contracts in Law, or Implyed, are such as do not arise from the speciall agreement of the parties, but are made by the act and operation of Law: As where an Ostler giveth my Horse meate, or a Taylor maketh my garment, that the one shall be paid for his meat, and the other for his work, and therefore the one may keep the Horse, and the other the Garment till they be payd if they will, or deliver him, and bring his action: So where another findeth my goods, he is chargeable to me by reason of his possession: So he that receiveth money to my use, or to deliver over to me, is chargeable as a receiver: So if one entreth into an Infants

fants or anothers Land, and take the profits, he is chargeable as Bayliff: So if a *Liberate* be delivered to the Clark of the Hamper, who hath Assetts in his hands, an Action of Debt lyeth against him, so it doth upon every Judgement: So if a man come into an Inne or Tavern, and call for Victuall, wine, or beer: And in this case some hold the Inn-keeper or Taverner may deteyn the body of the man untill he pay his shot; (but I much doubt this): And so it was agreed in *Trin.* 3. *Jac. B. R. Finches ley, f.* 180.

The exposition and operation of such contracts.

In these Contracts the Law doth not so much respect the form of words, as the substance of the agreement, and the minds of the parties: And therefore. *Kelw.* 87. 27 *Henry* 8. 14.

If one sell Todds, or Pounds, Bushels, Yards, Ells, or Pearches of any thing, it shall be accounted, measured and reckoned according to the custome of the Countrey and place, and not of the Statutes of any other Countrey. *Plowden.* 140. 41.

If the bargain were for twenty peices, and say not of what, it shall be expounded of twenty peices of gold of twenty shillings a peice by common intendment.

If a Contract be made for twenty barrels of Ale, or for ten pottles, or cups of Wine, the buyer shall not have the barrels also in the first, nor the Pottles or Cups in the next case: But if the bargain were for firkins of Wine, there it seemes he shall have the firkins also. If it were for a Hogshead of wine, he shall have the the Hogshead. *Cow.* 86. *a. Bros. Contract* 4. 27 *H.* 8. 27. *b.*

If one agree with another to make him a lease for years indefinitely, and say not when it shall begin, it shall begin presently. *Coo.* 6. 33.

If one for ten pounds promise to make good such a house by a day, this is a good contract, and it shall be taken that he shall repayr it: So if one owe me twenty pounds, and I say I will sue him, and *I. S.* prayeth me to forbear till *Michaelmas*, and he will make it good to me. *Keit* vers. *Michel, M.* 21 *Jac. B. R.*

If

If one sell all his Trees in such a Wood, and it is agreed that the Vendee shall not cut them untill *Michaelmas*, and in the interim Hawks doe breed in the Wood, it seems the Vendor, and not the Vendee shall have the Hawks. 27 *Ass.* 29. *Coo.* 11. 58. *q semble. dec. al Cont.*

If one lease Land excepting the trees, and Herons or Hawks breed in the trees, now in this case the Lessor shal have them, not the Lessee, and so also the Acorns of the trees. 14 *H.* 8. 1. *Kitch.* 264.

How contracts in writing shal be taken.

In Contracts and Agreements that are in writing under hand and Seale, as Bills, Bonds, or Covenants; the cause or consideration is not materiall; For whether it be with, or without consideration, it bindeth the party, and an action may be brought upon it (unlesse it be in case of Bargain and Sale of Land, *ut supra*) As if a Carpenter by writing delivered under his Hand and Seale promise to build a house, or to pay another twenty pounds, although there be no consideration for it: (*a*) But if it be a writing under his hand only, and not sealed and delivered, it bindeth no more then a bare verball promise: So also if it be sealed and not delivered. *Plow.* 308, 309. 12 *H.* 8. 4. 33. *Dyer* 90. 336. 21 *H.* 7. 43. *Fitz. Dett.* 126. *Plow.* 309. *Br. Act. sur le case* 40. (*a*) *Tr.* 18 *Jac. B. R. per Curiam.*

Where it is what makes a perfect parall contract upon which an action may rise, or the property of the thing altered.

Two things only seem to be necessary to the making of a good and binding Contract, such a one as to produce an Action.

1 That there be a good consideration (called) *Quid pro quo* in the agreement.

2 That the Contract be consummate and perfected; for if there be only a parly, and no perfect agreement, that is no such Contract as on which to ground an Action, and it is called a Communication. But if it be about the sale of any thing to alter property, a third thing is requisite: That the seller have an owner-ship in the thing sold, or power to sell them: or else that they be truly and without covin sold in a Market overt. *Coo.* 5. 83. *Plow.* 302. 479. *Dyer* 98.

Communication.

If I make a Lease for years to another, and he in consideration hereof promise to pay me a summ of money in grosse, or a Rent by the year, this is a good Contract; upon the fayler of performance whereof, I may have this action: And for the Rent I may have an action of Debt every year. *Litt: Br: sect:* 452. *Fitz: Dett:* 129.

If I sell a man my Land for twenty pounds, to be paid me on a day certain: In this case after the day, if the money be not payd, I may have an action for the money, though the Land be not assured, for he may compell me to that. 3 *H:* 7: 14. 2 *H:* 7: 12.

If one in consideration of a pint of Wine, promise to assure me of Land by a day, and do not, I may have Action, and that this is a good Consideration: But in this case it is probable the Jury will give but small damages. *Adjudg. Friends case. Trin.* 7. *Jac. B. R.*

A man that is tenant in Fee-simple of Land whereon trees do grow, may sell them, and the Contract is good: and although the Vendor dye before they be cut, yet the Vendee, (or if he dye, his Executor) may cut and take them away: But if a Tenant in tayle make such a contract, *contra. Co.* 11. 50. *Perk. Sect.* 58.

If *A.* be in debt to me, and deliver goods to *B.* to pay it, I require it of *B.* and he pray me to forbear it three weeks, and he will pay me, this is a good Contract, on which an action will lye. *Williams case. Ad.* 7. *Jac. B. R.*

If I promise to one if he will marry my Daughter, Kinswoman, or Servant, that I will pay or give him twenty pounds, or twenty pounds with my Daughter in marriage, and he do so; now he may recover this twenty pounds on this agreement, and sue for his money in the Temporall Court, and this is done daily, notwithstanding all the opinions to the contrary. *Plow.* 325. *Fitz: probib:* 2. 52. *Aff. p.* 70. 45 *Ed.* 3. 24. 14 *Ed.* 4. 6. 19 *Ed.* 4. 32. 27 *Ed.* 4. 5.

If I promise money to a Physitian to cure a poor man, or to a Labourer to amend a high way, this is a binding Contract, on

on which action will lye in respect of the nature of the works. 17 *Ed.* 4. 55. *Dett. & Sti.* 105. *Plow.* 305.

If a Ter-tenant of Land promise to do a thing to me, that have a Recognizance wherewith his Land is chargeable, in consideration, that I do assign to him the Statute by way of discharge; this is a good Contract, and consideration on which Action lyeth: But if the assignment of it were to a stranger, that were not good, for it is maintenance. *Adjudg. Pasch.* 38 *Eliz.* *Barrow* versus *Green.*

If one be in debt to me twenty pounds by Bill, and I promise to deliver him the Bill, and he promise me to bring two sufficient Sureties, and give bond for the money by a day, he may sue me, and I him, and there needs no averment of the performance of the one side to enable the Suit; and so in all such like reciprocall promises: But if the promise were conditionall, *contra. Adjudg. M.* 38. & 39. *Eliz. Gower*, versus *Capper.*

If I buy a Horse of another for Corn, it is a good Contract, and I must pay so much Corn as is agreed upon, and not money. *Fitz. Dett.* 68.

If one promise to me ten pounds when I have done such a work, now this is a good Contract; and when I have done the worke, I may sue for the money. *Plow.* 5. 44 *Edw.* 3. 22.

If a Contract be to pay for a thing five pounds, or a gowne such a day, this is good; and if one be not payd at the day, an Action may be had, and before and at the day he that is to pay hath Election, but after he to whom it is to be paid. 9 *Ed.* 4. 39. *Fitz. Dett.* 89.

If a man take my money, & promise in consideration thereof to build me a house by such a day, this is a good contract, and I may sue for breach of it. *Kelw.* 69.

If I be seised of land in fee, and make a lease thereof for life: And after in consideration of a certain sum of money devise and grant the same land to another for 50 years, to begin presently: this is a good Contract, and Bargain and Sale, to passe the Reversion and the Rent. *Co.* 8. 94. a. 35.

If one sell me a horse, or any other thing for money to be delivered at a day, and a day is set for the payment of the money, or all, or part of the money is paid in hand: or earnest (though but a penny) be given to the seller: or the thing bought be delivered or taken away by the buyer (though no money nor earnest be given, nor day set) In all these cases, there is a good Contract to alter the property of the thing: And in the first case the buyer may have an Action for the thing, and the seller for the money: In the second, the buyer may sue for the thing: In the third, the buyer may sue for the thing bought, and the seller for the residue of the money: And in the next case where Earnest is given, they have reciprocall remedy one against another: And in the last case the seller may sue for his money. *Co. 4. 44. Plow. 128. Dyer 29,30. 14 H. 8. 19. 9 H. 7. 21. 15 H. 7. 6. 21 H. 7. 6. 10 H. 7. 6.*

If two lay money on a wager, and put it in another mans hands, he that wins may have it, and he that hath lost hath no remedy for his money againe. *Agree at Surum, Ass. 9 Car.*

If I offer one money for a thing in a Market, or Fayre, and he agree to take it; and whiles I am telling the money as fast as I can, and the while he sell it to another; or we agree that he shall keep it untill I goe home to my house to fetch the money, these be good contracts: And if in the first case I pay or tender the money agreed upon; and in the second case bring the money as fast as I can, and pay or tender it, the property is mine, though it be sold to another. But this last case is to be doubted. *14 H. 8. 19. 15 H. 7. 6.*

Conditionall, and with reference.

If I sell a Horse for ten pounds, on condition that he shall pay me in Corn, this is a good contract, and he must pay me in Corn. *Fitz. Dett. 68.*

If one agree with another to give him so much for a thing as I. S. shall judge it to be worth, when he hath judged it the contract is compleat, and one may bring an Action upon it, and the buyer shall have a reasonable time to demand the Judgment of it. *6. Plow. 6. 14. H. 8. 19.*

If

If the Contract be to pay part of the money presently, and the rest at a day; and the seller gives him leave to refuse untill such a day; now if he agree before the day, the Contract is compleat, and reciprocall Actions lye for the things and the money. *Dyer* 99.

If a Contract be for twenty bushels of Corn, and that the party shall pay for them as he doth fetch them; now this is a good Contract, and the party must pay for them as hee doth fetch, or else the other may refuse to deliver them. *Dyer* 30.

If an agreement be made in this manner between *I. S.* and my selfe, That if he deliver me twenty pounds worth of clothes; or assure me such a piece of Land that I shall pay him twenty pounds: now this is good; and after the performance of the Condition (though not before) he may have an Action for the money: So in the like cases: As if I promise to make new pales for I may have the old. 33 *H.* 6. 43. 27 *H.* 8. 34. *Perk. sect.* 713.

If a Lessee for years lease over his Land on condition, that the Lessee shall get the favour of the Lessor, and pay so much as *I.* S. shall arbitrate: This is a good contract, and when he hath gotten his favour, and the other hath arbitrated how much, the contract is perfect and binding. 15 *Ed.* 4. 2. *Dyer* 76. 14 *H.* 8. 10.

If the agreement be that the buyer shall goe and see the thing, and if he like it, he shall give thus much for it, this is good: and when he seeth it, and doth once declare his liking the bargain is perfect, he cannot dislike it. 18 *Edw.* 4. 16.

If one sell Cattell upon condition, that if the Vendor doe such a thing, that he shall have twenty pounds for them, else but tenne pounds: this is a good Contract, and the same will be more or lesse as the condition is, or is not performed. *Perk. sect.* 712. 714.

If

If I buy wares of one for twenty pound to be payd to him when he delivers it me, it is a good contract, but if he never deliver it, I shall never pay for it. *Fitz. Dett.* 56.

If I lend one mony, and thereupon he enfeoffe me of Land, and by agreement, I am to take the profits of the Land untill he pay the mony: this is a good Contract, & it seems I cannot recover the mony, whiles I have the Land. *Fitz. Det.* 100.

If a Contract be for a horse at a price, but withall that the Plaintiffe or seller shall bring and deliver him at such a place; this is a good Contract, but this must be done also, or the Action will not rise: *Fitz.* 144.

If one sell any thing to another, and he take it away, albeit no price be agreed upon, yet the Contract is good, and if it be Wine, or any such like thing, the certain rate whereof is set down by Law, the Vendor may sue for so much mony in certaine; but in other cases he must surmise that he promised to pay him as much as it was worth, and then averr it is worth so much in certain. *Trin.* 8. *Car. B.R.* 9. *Ed.* 4.

Where it is single for want of consideration.

A contract may be bad and void, either for some defect in the cause and consideration; or for default in the promise it self: In the cause when either there is none, or no good consideration. (1) When there is no benefit to the party to whom; nor prejudice, losse, or trouble to the party by whom the contract is made, for then it is but *nudum pactum*, or when the cause and consideration is unlawfull. 2. In the promise it self, it may be defective, either for incertainty. (*i*) when it is either altogether uncertain, or else so incertaine, as it cannot by any means be made certaine: or when it is imperfect. (*i*) when it is only in inchoation, and but a Communication only, and not perfect and compleat: Or it may become voyde, by matter *ex post facto*, in either of these a contract may become voyd. As in the example following. *Co.* 10. 102. 76. *Dyer* 356. 17. *Ed.* 4. 4. 9. *H.* 7. 21. 10. *H.* 7. 6.

If I promise to pay another twenty pounds, because he is my Kinsman or acquaintance; I can have no Action upon this for it is *nudum pactum* only. *Plow.* 309. 302.

If one buy of me a house, or other thing, for mony; and no mony is payd, nor earnest given, nor day set for

for payment, nor the thing is delivered; here no Action lyeth for the money or the thing sold, but I may sell it to another if I will, for it is but *nudum pactum*: 11. *H.* 4. 33.

If one promise to give or do to another somewhat for that which is past: as because he hath builded a house, or because he hath let his friend have wares: or because his friend doth owe the other mony. That if he do not pay him, he will, this is but *nudum pactum*. This hath been often Adjudged. *Doct. & Stu.* 105.

If I promise to one, that in consideration he will deliver me twenty Crowns; I will deliver them to him againe; this is a promise which no Action will lye, unlesse he had delivered them to me first, and thereupon I had promised to redeliver them. *Adjudge.*

If I promise to one without any cause to give him twenty pounds to make his house anew: or towards his losses by Fire, or the like, this is such a promise, as will not yeeld an Action. 17. *Ed.* 4. 4: *Plow.* 308.

If *I. S.* owe me ten pounds and another comes to me, and tels me he will be my Paymaster for the ten pounds and pray me to take him for debtor; and nothing is given by me for this, now no Action will lye for this. *Fitz. Debt.* 126. *Termes ley. Contract.*

If I promise to another in consideration, that he will make me a Lease generally, to do such a thing; this is but *nudum pactum*, for he may make me a Lease at will, that may end as soone as it begins. *Pasch.* 39. *Eliz. Coo. B. Lurking case Adjudge.*

If one promise to me in consideration that I will relinquish my suit, to do such a thing; this is no good consideration, for he may relinquish it and begin againe. *Pasch.* 39. *Eliz.*

If the cause of the promise be to do an unlawfull thing, as either that which is *malum in se*, or *malum prohibitum*, there the contract is voyd: But if part of the consideration be lawfull and part unlawfull; there it may be good: But if it tend wholly to maintenance, or the like, it is all nought. *Coo.* 12 102. *Dyer. Onleys case, Churches case p.* 7. *Jac. B: R.*

If

For other causes.

If I come into the market and aske the price of any thing, and the seller set a price, and I go home to my house to fetch the money as fast as I can, and he sell it the while, now in this case I can have no Action for this, neither was the property changed, for the sale was not perfect. 14. *H.* 8. 19.

If one bargain and sell his Land and the trees upon it: but the Deed is not enrolled, and so the Land doth not pass, nor the trees will not passe neither. *Co.* 11. 48.

If I sell and deliver my horse to one first, on Condition, that he pay me five pound at a day for him, and before the day I sell him to another, this second Contract it seems is voyd although I have not my money payd, and I seise him again. *Pla.* 432.

If I prize wares, and the Tradesman say so much: now the bargain is not perfect untill the money be payd, unless a day be agreed, it is imperfect and voyd untill then. 17. *Ed.* 4. 1.

If the promise be to do a thing, either *malum in se*, or to do, *a malum prohibitum*, (although the consideration be good) or to do any thing contrary to Law, it is voyd, and will not bind: no more then where the consideration is nought; for Law will not work with such unlawfull Contracts. (*See more in Obligations & Covenants.*) Also a Contract that is Usurious, is against Law and void. *See for this Usury. Co.* 10. 102. *Dyer* 356.

A Bishop hath the first fruits of the Clergy, within his Diocess, and if a Parson pay him part, and promise him the rest by a day, but doth not pay it; the Bishop can have no Action, because the thing is meerly spirituall. *Co. super Litt.* 162. *b.*

Conditionall & with reference.

If one owe me twenty pound, and I buy of him goods, to the value of five pound, and it is agreed between us, he shall estop & keep up five pounds for this sale, of the twenty pounds, it seems this is not a good contract, neither can I plead it in Barre, if he sue me for the five pound. *Fitz. Dett.* 86.

If one sell his horse or other thing for so much as *I. S.* shall set down; and *I. S.* dye before he set down the summe, or refuse to do it, then the contract is voyd. 14. *H.* 8. 10.

If

If an agreement be between another and me for ten pounds, for such a parcell of Wood, if he like it when he seeth it, and he when he seeth it doth dislike it, now by this the Contract is become voyd, and he cannot after by his liking make the agreement good: 8 *Ed.* 4. 16.

If an agreement be between me and another, that one shall go and see my corn in such a place, and if he like it when he hath seen it for so much money that he shall have it: now the contract is not perfect until he have payd the money and agreed to take it at the rate: *See more of these matters in Assumpsits.* 17. *Ed.* 4. 1.

Where a contract shall be extinct, and determined, and where not.

If one make a Lease for years, rendring Rent, and the lessee be evicted by title *Paramount*, the contract is discharged, and he shall pay no Rent: So if the Lessor had nothing in the Lands at the time of the Lease, the Lessee may Plead it and avoyd the Rent. *Broo. Sell.* 52. 135. *Litt. Sect.* 58.

If one sell a horse or other ware for money, to be paid at a day, and before the day, the true owner thereof take his horse, or goods, the debt is not discharged, but the seller may have an Action to recover the money notwithstanding. *Finches ley. fo.* 45. *Co.* 3. 21. 4. 18. *Ed.* 4. 6.

If one have a debt due to him by a Contract, and he do after take an obligation for it, or any part of it, now hereby the whole contract is determined. So if he sue upon the contract, and recover, and get a Judgment, the Contract is determined: 3 *H.* 4. 17. *Co.* 5. 45. 9 *Ed.* 4. 54. *Dyer* 21. *F. N. B.* 121.

If I be an Artist, and one promise me ten pounds, to teach him in such an Art seven yeers; and I dye before the money payd, or seven years expired: now the debt is gone. 21 *Ed.* 3. 11.

But if I take a writing indented only, or indented and sealed also, of a Contract made to me; but it is not delivered and made an Especialty; this doth not determine the Contract: So if a Debt on a Contract be due to me, and I take an Obligation from a stranger (and not from the party for it) this doth not determine the Contract: so I take an obligation or other especialty from the party, and it be voyd, or it become voyd, by matter *ex post facto*, this will not determin the Contract. *Dyer* 230. *Fitz. Dett.* 68. 3 *H.* 4. 17. 21 *H.* 7. 9.

If one promise me eight pound to teach him in my Art seven years and he pay me the money: or give security to pay it by a day, and I dye before, yet the monty must be paid, and it seems the other hath no remedy. 21 *Ed.* 3 41.

where a contract may be apportioned or divided, and where not.

A contract cannot in any case be apportioned, but either the duty must be all paid, or all lost. As if a Lease be made, yeilding Rent, & the lessor enter upon part of the Land leased, the whole Rent is suspended. And if a stranger enter by title *Paramount*, upon a part of the Land only, the whole Rent shall remaine. 9 *Ed.* 4. 1. *Brow. cap.* 52.

If the Husband sell the trees upon his wifes Land, and the Vendee take part of them, and after before he take the rest, shee dye; now though he cannot take the rest of the trees, yet he must pay all the money upon the contract: But if a day were set to cut them, and not before, and she dye before the day, there if he had cut part of the trees, he should not pay any of the money. 18. *Ed.* 4 6. *Brow. Contract* 26.

If one make a Lease for years, and sell goods, all by one contract, for one summe of mony, and the goods be took away from him before the money be paid, yet the buyer must pay all the money. So if one sell two horses for ten pound, and one horse is the horse of another mans, and he take his own again, he must pay the whole ten pound, (but he may have remedy against the seller.) *Et sic fuit L'opinion Just. Dodd. Tr.* 14 *Jac. B. R.* 7. *H.* 7. 4. *Brow. Contract. Sect.* 52. 135. *Litt. Brow.* 12. *H.* 8. 13. 9 *Ed.* 4. 1.

If an Abbot had made a Contract for Goods, and part of the Goods had come to the use of the house, and part not, yet the successor was chargeable with all. 38. *H.* 6. 28. *a.*

If a Bond be made to secure money lawfully lent and money upon usury, it is voyd for all: *See more in Apportionment. Trin.* 34. *Eliz. Trevor.*

Feme. where a man shall be charged, or bound by the act of another, and where not.

If a Feme Covert, do sell the Goods of her Husband by authority precedent from him, or if he do afterwards agree to it: or it seems if he do not disagree to it in his life time; this shall bynd the Husband: *Qui tacet Consentire videtur.* So if she buy any thing by any authority generall or speciall: or without any authority, if it be for her necessary Apparrell, the

husband shall be charged (*vide Baron & Feme*) But if she buy Goods for her husband, or to his use, without his Authority generall or speciall, he shall not be charged for it (although it be spent in his house) unless he do afterwards agree to it, 27 *H.* 8. 25. 21 *H.* 7. 40. 20 H. 6. 22. *old N. B.* 62.

Servant.

If I give my Servant authority to buy for me, or he be my common Baily, and buy for me, I shall be charged, though they never come to my use, and though I never have notice of it, 21 H. 7. 40. *F. N. B.* 120. *G.*

Where a man shall be charged with a Contract made by him to another, &c.

If a Purveyor, Clerk of the Market, or other that taketh up for the King, buy any thing for the King, after he hath made his Account to the King and is allowed, he may be sued and charged for it (but not before) unless he made a promise to pay for it, for then he may be charged before his Account, 11 H. 4 28. 2 H. 4. 28.

If a Servant buy for his Master and promise to pay the Seller, and do not, the Seller may charge him in an Action of the case, and if he had an authority from his Master, he may charge him in an Action of debt.

Arbitrement is a good bar in debt upon a Contract, 4 H. 6. 17. *b.*

What shall be a good bar in debt upon Contract, and what not.

So a Bond made by the Debtor to the Creditor for the debt or any part of it, for by this all the Contract is determined, *Dyer* 21. *b. f. n. br.* 121. *M.* 3 H. 4. 17. *b.* 11 H. 4. 79. *b.* 9. *E.* 4. 50. *b.* 29 H. 8. *Br. Contract* 29. 21 H. 7. 5. *b.* 6. *rep.* 45. *a.*

Otherwise, if the Bond were made by a stranger, 29 H. 8. *Br. Contract* 29.

A Judgment had upon the Contract is a good bar in debt upon the Contract, although execution be not done, *Dyer* 21 *b.* 39 H. 6. 34. *b.* 9 *Ed.* 4. 54.

To an action of Debt upon a Contract, payment is a good plea, 41. *E.* 3. 7. *a. by Thurp. Br. Dett* 129. 9 H. 6. 9. *b. by Paston*, but yet by 1 H. 5. 6. *b. per Cur.* 40. *E.* 3. 24. *b.* 41 *E.* 3. 7. *a. by Candish.* 46. *E.* 3. 6. *a.* Payment is no good plea in such case, without shewing an acquittance.

And *Martin* in 9 H. 6. 9. *b.* saith accordingly, because (saith he) he may wage his Law.

If the Plaintiff hath brought an action of debt upon the Contract, and hath been barred by wager of Law, and now he brings an action of the case for the same debt, the Defendant may plead this and bar the Plaintiff, *Fitz. tit. Action sur le case* 105.

Baylment. It is the delivering of things to another, whether Writings, Goods, or Stuff, either to be redelivered to him that delivered it, or to be kept by the other, to his use, or to be delivered over to a stranger, *Termes ley. Perk. cap.* 712.

And this is sometimes upon condition (*i*) to be redelivered when money is paid, and something is done, and then it is a Pledge; And sometimes it is simple without any Condition, then called a simple Baylment (*i*) when one receiveth them to keep for another, whether it be for the Baylor to redeliver him again (in which case he may retake them without request) or for a stranger, to deliver them over to him (in which case before the delivery over, the Baylor may countermand and require the Goods again, and if the Baylee refuse to deliver them he may have an Account, for the property is not altered) And this delivery is also sometimes to imploy, as when he hath the things deliverd to use to anothers profit, as to sell, *Melior is modo quo poterit*. In which case if he sell it for twelve pence, though it be worth a hundred pounds, and he might have had more, yet is the Baylor without remedy, 5 *H.* 7. 18. *Finches ley in Anglois f.* 179. 1 *Ed.* 5. 2. 41 *Ed.* 3. 2. *Coo. super Lit.* 286.

Note that wheresoever I may have a Detinue for goods, I may justifie the taking of them where I find them; Sheaves of Corn to B. to deliver over to C. B. thresheth them, A. may seise the Corn threshed, as it was resolved in 38 *R. B. Roy*, for B. by his threshing may not alter the property of A, *Lit. Sect.* 498.

Detinue. It is a Writ that lyeth where a man hath Goods or Cattell of mine either by finding or by my delivery to him, to keep or deliver over, and he doth refuse to redeliver them, or to deliver them over according to appointment, and detaineth, or hath lost or mis-imployed them, then by this Writ I may recover the thing it self, if it be to be had, or if not, damages for the thing and the detaining, 14 *Ed.* 3. 2. *F. N. B. f.* 138. *Coo. super Lit. f.* 286.

In

In this Action the thing demanded must be so certain, as it may be known and distinguished from others; For the Judgment is to recover the thing in kind detained, with damage for the Detainer; or if the thing cannot be had, then damages both for the thing and Detainer also; or if it be to be had, it is at the election of the Plaintiff, to have the thing it self, or damages for it, 18 *Ed* 4.23. *Kelw*: 64.3 *H*.6.43. 39 H. 6.44. *Dyer* 331.22.

The Judgment thereupon.

This Writ lyeth for any personall Goods or Cattell that is valuable, and wherof and wherin one may have a property; As for Cattell, Cloath, Houshold stuff, money in Bags, or Chests, Corn in sacks, Charters, or Writings, loads of Wood, Tuns of Oyle, or the like, *Dyer* 22.1 *R*.3.2.

where, and for what things it lyeth, and wher not.

But it lyeth not for money out of a Bag, or Chest, or Corn out of a Sack, because it cannot be distinguished, 12 H.8.5.

Where and in what case it lyeth and may be brought.

In all cases where this Writ may be had, these things must be in the case; 1. The thing must be of that nature as for which this Writ may be had, *vide supra*. 2. He that brings this Writ must have right to, or a property in, the thing demanded, at the time of the Writ brought, or be chargeable over for it to some other. 3. The thing demanded must have been once in the custody of him that is to be charged. 4. This custody and possession must continue, and not be removed by an act of Law, as a Seisure, or the like, *Coo*: 11.89. 27 *H*.8.33.

For goods and chattels.

If I deliver Goods to one, to deliver to *I.S.* and before they are delivered to *I.S.* I do forbid the delivery of them, and require them, and he refuse to deliver them to me, I may have this Action, 1 *Ed*: 5.5. 5 H.7.18.

If Goods be delivered to one to my use, or to be delivered over to me, and the party do refuse to deliver them to me accordingly, I may have this remedy, 5 H.7.18. *F. N. B*:38. 11 *Ed*: 4.55.

If Goods belong to me by Custome, as a Harriot, Heyreloomes, or as *rationabilis pars bonorum*, and they be with-held or essoined from me, after the death of my Tenant or Ancestor, I may recover them by this Writ, *Kelw*: 184.8 H.7.10: *Plow*: 90.39 *Ed*: 3.6.9.

If I buy Cloath, or other Goods of one upon a good Contract,

trect, and he keep it from me, and will not deliver it, I may have this Writ, *Dyer* 30: 203:

If a woman have Goods as executrix, and her Husband continue the poſſeſſion and dye, and his Executor keep the goods, ſhe may have this writ againſt him and recover them, *Dyer* 331:

If I deliver one my goods as Pledge, and at the day the mony is tendred, or thing done, and yet the party refuſe to re-deliver it to me, in this caſe I may recover it by this Writ, *Cor.* 4: 84: 29. *Aſ:* p. 28:

If I leave my Goods with another man to keep, and he take them into his houſe, although he be to have no recompence for the keeping of them, yet he muſt anſwer them, and I may recover them by this Writ. *Cor.* 4. 84. 29 *Aſ:* p. 28:

If one find my Goods and have them in his cuſtody, I may recover them by this Writ, 39 *H.* 6. 2. 12 *Ed:* 4. 8. 27 *H:* 8. 13.

If I deliver my Goods to *I. S.* and he deliver them to *W. S.* it ſeems I may have this Writ againſt either of them, and recover them. 12 *Ed:* 4. 8.

If Goods be given in free marriage to a man and woman, who are after divorced: in this caſe after the Divorce, ſhe may recover the Goods by this Writ. *F: N: B.* 139.

If I deliver one a box of money to keep faſt locked, or otherwiſe made faſt; or deliver or lend a man my horſe to ride, or deliver a Taylor my Cloath to make a Garment, or deliver Goods to a common Carrier, or my horſe to a common Hoſtler. And the party break the box and uſe the mony, or ride my horſe further and do not re-deliver him, or the Taylor ſpoil, ſell, or mar my Cloath, or the Carrier looſe, or ſpoil my goods, or the common Hoſtler abuſe or detain my horſe. In all theſe caſes for the Detainer I may have this Writ; And for any voluntary abuſe done to the thing delivered: an action of the caſe alſo. *Cor.* 4. 95. 18 *Ed.* 4. 23. *D.* & *St:* 102. 2 *H:* 7. 11. 12 *Ed:* 4. 8.

For Charters. If a man keep my Charters from me which concern the Inheritance of my Land, if I know the certainty of them and what Land they concern, or if they be in a Bag ſealed, or a Cheſt

a Cheſt locked, though I know not the certainty of them, I may recover them by this Writ; And herein it is policy, if I can, to declare of one Charter in ſpeciall, for then the Defendant, ſhall not wage his Law, 41 *Ed.* 3. 2. 8 H. 6: 18: 3 H. 6: 19: 9 H. 6: 18. *Coo: ſuper Lit:* 286: *Coo:* 1: 124 H. 7: 7.

As if Lands be given to me and *I.S.* and my heirs, and he dy, and another get the Deed, I may have this Writ againſt him: So if one be outlawed that is an Obligee, the King may have this Writ for the Obligation (*a*) So if the Tenant in tail give away the Deed of intail, and dye, his Iſſue by this Writ ſhall recover the Deed, (*a*) 38, 39 *Eliz:* 2: *B. R. Kel.* 8. *Sacks caſe.*

If I deliver one mony, or Coin, or any ſuch like thing which cannot be known nor diſcerned from other of the ſame kind, and it be not in a Bag, Box, or Cheſt, this Writ lyeth not in this caſe, but rather an Account, *Dyer* 22. 29. 12 H. 8. 3. 6 *Ed.* 4. 11. *where, and in what caſe not.*

If one take my Goods or Cattell by wrong as a Treſpaſſor, or diſtrain them for Rent, or for damage-feaſant, I cannot have this Writ for this, *Coo.* 11. 89 *Br. Detinue.* 242. *For goods or cattels.*

If one deliver Goods to me and I bid him take his Goods again, and he refuſe to do ſo, and therupon I diſtrain them damage-feaſant, he cannot have this Writ againſt me, 43 *Ed.* 3. 21.

If a man take Cattell of mine upon his Paſture, and there they dye or be ſtollen, in this caſe I ſhall not have this Writ; but the opinion of Juſtice *Hutton* at *Sarum Aſſiſes*, 21. *Jac.* was, that if they be ſtollen the Owner of the Paſture muſt anſwer them; of which I muſt doubt, *Quere* therfore, See *Coo.* 8. *in Calois caſe, per Juſt. Bridgm.* 7 *Car.*

If a man take any Goods of mine in a ſpeciall manner (*i*) to keep as he keepeth his own, or the beſt he can, or if they be loſt that it ſhall be at my perill, and they be ſtollen from him, he ſhall not anſwer them, neither doth this Writ lye; or if he bring this Writ, the Defendant may plead this in bar, *Coo.* 4. 84. 3 H. 7. 4.

If *I* find Goods, and *I* ſell them, or they be ſtollen from me before Action brought, there it ſeems this Writ will not lye, but that an Action of the Caſe, *Trover* and *Converſion* will lye, 27 H. 8. 13.

If

If I deliver one a Coffer locked, and ſomthing be taken out of it, if I keep the Key my ſelf, I ſhall not have this Writ, but if the whole Coffer be taken away, there it ſeems I ſhall have this Writ, at leaſt for the Coffer, *Coo.* 4.83.

If a Bayliff of a Sheriff diſtrain a mans beaſts in *Withernam*, and after do deliver them to the party from whom he took them, or otherwiſe, this Writ lyeth not for him for whom they were diſtrained, *Broo. Condition* 34.

If the nature of the goods be altered as if it be Leather and made into Shoos, or if Parchment and Paper, and made into Writings, no Detinue will lye for it, *Per Juſt. Fenner, M.*38 *Eliz.*

For charters. If a woman great with Child by her deceaſed husband keep the Charters from his Daughter and Heir, that do concern the Land; whilſt ſhe is ſo with Child, this Writ lyeth not againſt her, 41 *Ed.*3.11.

If two Executors be, and one deliver an Obligation to the Debtor, and dye, the other doth ſurvive, cannot recover it again by this Writ: So if a Tenant in fee-ſimple give away his Deed, his Heir cannot recover him by this Writ; So it ſeems if one Leſſee for years, give away his Leaſe, that his Companion is remedileſs, and yet nothing doth paſs by the gift of the Leaſe, *M.*38. & 39. *Eliz. B.R. Relſock verſ. Nicolſon.*

where, and what matters are pleas good, in bar to this Action, or not. It is a good plea in bar to ſay, that the things were delivered to be delivered over to another, and that he did deliver them accordingly, if there were no Countermands; And ſo it ſeems it is, though the delivery over were after this Writ was brought, 5 H.7.18. *F.N.B.*138. 12 *Ed.* 4.8.

If the Detinue be brought for a Horſe lent, it is a good plea to ſay, that the Horſe was ſick of divers diſeaſes at the time of the delivery, and that he dyed therof before any requeſt was made for re-delivery, 21 *Ed.*4.55.

It is a good plea to ſay, that he delivered or offered to deliver the thing for which the Suit is, before the Writ brought, 12 *Ed.*4.8.

It is a good plea to ſay, that after the party delivered the Goods, he gave them to the party to whom they were delivered, 21 *Ed.* 4.55. 12 *Ed.*4.8.

It

It is a good plea to say, that after the Goods taken and delivered, the party that delivered them was outlawed, and the Goods seised for the King, or that they were taken in Execution, 12 *Ed:* 4.8.

If the Writ be against a Taylor, it is a good plea to say, that the party would not pay him for making his Garment. If against an Hostler, to say, that he would not pay for his Horse-meat, for they may justifie the detaining till payment, 5 *Ed:* 4.2.

If the Writ be for Goods that were pledged, and that the party would not deliver, it is a good plea to say, they were stollen before the mony tendred, or the time of redemption: but if the mony were tendred at the time and the party refused to deliver them, and after they are stollen, this is no good plea, *Co:* 4.23. 20 *Ass:* p.8.

If the Writ be brought for Goods found, it is a good plea to say, he delivered away the Goods before the Writ brought, and hath not the possession of them, 27 *H.* 8.21.

If the Action be brought for goods delivered to be re-delivered, or delivered over to another; it is a good plea to say, he took charge of them specially (*i*) to keep as his own, *&c. vide supra*, and that they were afterwards stollen; So if he take charge of them generally, so if they were Cattell at pasture, it is a good plea to say they dyed, or were stollen, *vide supra*, *Co:* 4.84. 10 *H.* 8.21:

If a man have goods of mine in his house in a Coffer, and *I* keep the Key, and they be stollen, it is a good plea that *I* had the Key, *vide supra*.

If *A.* bail goods to *B.* generally to be kept by him, and *B.* takes them without having any thing for them, if the goods be stollen from him, he shall not be charged in a Detinue, 29 *Ass:* p.28. 3 *H:* 7.4 *b.* 10. *H.* 7.26. *a.* & *acc: per Just: Dodd: H:* 16, *Jac: B: Roy: Entr:* 4. *rep:* 83. *b. Doct. & Stu.* 130 *a.*

It is where a Detinue is brought for Charters, and the Defendant saith, they were delivered to him by the Plaintiff and another upon certain conditions, and therfore he prayeth that the other may be warned to plead with the Plaintiff, and shew whether the Conditions be performed yea or no; And hereupon *Garnishment.*

hereupon a *Scire facias* shall go forth of the Court to warn him to come into the Court for this purpose. And this is called *Garnishment*, and when he cometh he shall plead with the Plaintiff, and this is called *Enter Pleader*, and then upon the *Enter Pleader* if the Garnish cannot bar the Plaintiff, the Judgment shall be given against the sayd Defendant for the Deeds, and against the Garnishee for the Damages, and so shall the Execution be likewise; and if the Garnishee made default the Plaintiff shall recover the Writings against the Defendant, but no Damages; and a Distress shall go forth against the Defendant to require him to deliver the Writing; and if Judgment be given against the Plaintiff, the Garnishee shall recover Damages: This word also is taken in another sense, for which *see stat.* 2. *Ed.* 3. *cap.* 17. *Terms ley.* Coo: 5. 90.

Where and how a man shall be charged for another mans goods delivered to him, or not.

If a man lend me Mony, Corn, or such like thing, he cannot expect the same again, but the like, or so much; But if one lend me a Horse, or the like, he must have the same again restored, and if the thing be used to any other purpose, or otherwise then to that end for which I borrowed it, he may have an Action of the Case against me for it, though the thing be never the worse; But if the thing borrowed be lost (though it be not by any neglect of mine) as if *I* be robbed of it, or it be impaired or destroyed by my neglect, albeit *I* do put it to no more service then *I* borrowed it for: As if *I* put a Horse *I* have borrowed in an old rotten house ready to fall, and it doth fall and kill him, in these cases *I* must make them good; But if such Goods delivered to me perish by the act of God in the right use of them; as if *I* put a Horse *I* have borrowed in a strong house, and it fall and kill him, or it dye by a Disease, or by the default of the Owner, without any neglect of mine, in this case *I* shall not be charged with them And if any man deliver me his Goods to keep, and *I* take them, *I* must answer for them, and see them safely restored, and if they be stollen, or as it seems burnt or drowned by inevitable Accidents, albeit *I* do neither undertake to keep them safe, nor promise to restore them: And if a man deliver Goods to a Carrier for hire, and he be robbed of them, yet he must answer the Goods;

Goods; but if a man deliver Goods as a Pledge, and they be ſtollen before tender of the money, he that had them for a Pledge ſhall not anſwer for them, but after tender of the money he ſhall, 5 *Germ: lib.* 2, *cap:* 38. 2 *H:* 7. 11. 2 *Ed:* 4. 5. *Co:* 4. 38. *Co: ſupor Lit: fol:* 89. a. 29 *Aſ: p.* 28.

It is a man that is, or is reputed to be broken in his Eſtate.

Bankrupt. Where and in what caſe a man ſhall be ſaid to be a Bankrupt.

If any one that ſhall uſe the Trade of Merchandiſe, or that ſhall get his living by buying and ſelling, or that ſhall uſe the Trade of a Scrivener, receiving other mens Monies, or Eſtates into his truſt or cuſtody; ſhall depart the Realm, begin to keep his houſe, or otherwiſe abſent himſelf, or take Sanctuary, or ſuffer himſelf to be arreſted willingly for any debt or other thing, not grown due for mony delivered, Wares ſold, or any other juſt or lawfull cauſe, or good conſideration or purpoſes; or if any ſuffer themſelves to be outlawed, or yeeld themſelves to Priſon, or depart from their dwelling houſe, to the intent or purpoſe to defraud or hinder their Creditors of their due debt; or willingly or fraudulently procure themſemſelves to be arreſted, or their Goods, Mony, or Cattell to be attached or ſequeſtred; or make any fraudulent grant or conveyance of their Lands, or Tenements, Goods, or Chattels, to the intent wherby Creditors might be defeated or delayed the recovery of their debts; or ſhall by himſelf or others by his procurement get any protection, other then ſuch as are lawfully protected by priviledge of Parliament; or ſhall prefer to his Majeſty, or any of the Kings Courts any Petition or Bill againſt their Creditors, to deſire or endeavour to compell them to take leſs then their juſt and principall debts, or to get longer time of payment then is upon the originall Contract; or being in debt to any one a hundred pound or more, ſhall not pay or compound for the ſame, within ſix months after the ſame ſhall be due, and the party arreſted, or within ſix months after an originall Writ be brought and notice given therof unto him, or left at the houſe where he laſt dwelt; or being arreſted for debt ſhall lye in Priſon two months or more for that or any other Arreſt, or detention of priſon for debt; or being arreſted for the ſum of a hundred pounds or more of juſt debt, ſhall after eſcape out of Priſon,

or get out by putting in common or hired Bail; He shall be shall be counted a Bankrupt, *Stat.*13. *Eliz. cap.*7. 21 *Jac. cap.* 19. 1 *Jac.*15.

The proceedings against such Bankrupts.

In this case upon a Petition by the Creditors, or some of them to the Lord Keeper, setting forth the case, a Commission shall be granted to Gentlemen in the Country, to take and imprison the body of the Bankrupt, and to enter upon and sell all his Lands and Tenements, as well Copyhold and Customary, as Freehold, whereof at the time of his first being Bankrupt he had, or at the time after he shall have any Estate in Fee-simple, Fee-tail (unless where the Reversion is in the King) or for life, Offices, Goods, or Chattels in his own possession, or which others shall have to his use, or in trust for him, after the same shall be viewed or appriſed, and the same sale shall be by deed indented and inrolled in one of the Kings Majesties Courts of Record, and then shall distribute the same to every of the Creditors a portion rate and rate like, according to the quantity of their Debts, and what they shall do in the Premisses shall be good and effectuall against the same Bankrupts, Lords of Mannors, and all that shall have any joynt-Estate with them, or shall have any interest to their use or behoof, and all that shall claim by, from, or under them; And that such Commissioners shall give to the Bankrupt desiring the same, a true Declaration of all their proceedings, *Stat.*13. *Eliz.*

Commissioners and their duty and directions.

The power of the Commissioners.

The Commissioners may call and require to come before them, and examine the Bankrupt himself, or his Wife, or any others they shall suspect to have any of the Bankrupts Estate, to discover his Estate, and where it lyeth; And if any person that shall have any part of the Estate in his custody, shall upon examination refuse to answer, or deny the same, he shall forfeit double the value of that he shall so deny, to be distributed amongst the Creditors; And if the Bankrupt himself have fraudulently conveyed away any of his Estate, to the intent to delay or deceive Creditors of their due debts, and shall conceal it being examined, that he upon conviction therof at the generall Assises, shall be set on the Pillory for two hours, and have one of his eares cut off, *Stat.*13. *Eliz.*21. *Jac.*

They

They may for the finding, and apprehending, diſcovering, and ſeiſing of the body, or Eſtate of the Bankrupt, break open any Houſes, Chambers, Trunks, or Locks whatſoever, 21 *Jac.*

(If any perſon ſhall claim any debt due from the Bankrupt, or any of his Goods, or any thing is his, and cannot prove himſelf to have right in Law and conſcience thereunto, that he ſhall forfeit double the worth therof, to be diſtributed amongſt the Creditors, if there be not enough beſides of the Bankrupts Eſtate to ſatisfie the Creditors.) 13 *Eliz:*

If the party be gone from his dwelling place, the Commiſſioners may cauſe five Proclamations to be made five market daies, neer the place where the Bankrupt lately dwelt, that he yeeld his body to them, by a day, and if he do not he is to be out of the Kings protection, 13 *Eliz.*

They may examine the debts demanded and claimed, how much and what they are, by ſwearing the parties themſelves or others, and if any claim or have levied any debt for the King, as Accountant, if they find it otherwiſe, they may diſpoſe the Eſtate notwithſtanding, 21 *Jac.*

If the Bankrupt uſe any other mans Goods as his own, the Commiſſioners may ſell and diſpoſe them; And if the Bankrupt had mortgaged his Land, the Commiſſioners might redeem it. *See the ſtatutes,* 21 *Jac.*

Theſe ſtatutes ſhall be largly expounded for the relief of Creditors againſt the Bankrupt, *Stat:* 21 *Jac.*

Reſolutions of the Judges upon theſe ſtatutes.

No man ſhall be ſayd to be a Bankrupt within theſe ſtatutes, but ſuch a one as is a Merchant, or one that doth get his living by buying and ſelling; and therfore that a Husband-man only is not within the ſtatute, but if the Husband-man if he be a Drover alſo is within the ſtatute, *per Baron Den:* 3 *Car: Regis Com: Wil: at Summer: Aſſ:* But it is not requiſite that he do continue his Trade of buying and ſelling, to the time he doth become Bankrupt, but it ſufficeth that he hath uſed the Trade, and during that time he became indebted, and for that debt he is now become a Bankrupt: As if a Merchant go down into the Country, and leave of his Merchandiſing by the ſpace of two years, and after this he doth abſent himſelf from his Creditors by reaſon of debts he did owe unto them whilſt he

was

was Merchant, he is a Bankrupt, *M.* 20. *Iac: in Banco Regis, in a case between Hicroft and Hall.*

2. If *A.* deliver mony to *B.* to trade with it, to the intent that *B.* shall give unto him an account of the profits that shall arise by the mony in the Trade, and that *A.* shall share with *B.* in the profits of the Trade, according to that portion of mony that *A.* doth deliver to *B.* in this case *A.* shall be sayd to be a Tradesman within these statutes, and therfore may be a Bankrupt within these statutes.

3. If one absent himself by the space of one day; and after he goeth abroad, this will not make him a Bankrupt; But if a man keep his house for fear of Writs of Arrest against him, though no Writs be gone out against him: Or if he doth but begin to keep his house, with intent to deceive or delay his Creditors, though it be but by the space of an hour, he is a Bankrupt; Or if he make a fradulent Deed of gift of his Goods to deceave his Creditors, he is a Bankrupt; or if there be divers Creditors that come together to speak with the party, and he doth speak with some of them, but doth refuse to speak with the rest, this will make him a Bankrupt.

4. If the Petition (which is to set forth the time when he became Bankrupt) do shew that he was as Bankrupt, 1 *Junij* 18 *Iac.* and the Commissioners find that he became a Bankrupt first in *November* following, yet it is well enough, for it sufficeth that he is a Bankrupt, and the time is not materiall.

5. Although the statute say, the sale by the Commissioners must be by Deed indented, and that after view of the Goods, yet a sale by any other Deed, and that before view is good, *Coo.* 2. 25.

6. The Commissioners cannot make any Assignment to many Creditors together for their debts, but it must be severally to every one his part, else it is not good.

7. A Bankrupt after the time of his becoming Bankrupt, cannot prefer one Creditor before another, to pay him all his debt out of the Estate, neither can he then make any disposition of his Estate, but the Commissioners will avoid it.

8. Such Creditors only as come into the Commissioners and make known their debts, and none others shall have benefit

nefit by theſe ſtatutes, and not ſuch as obſtinately refuſe, or wilfully neglect, *Vigilantibus & non dormientibus ſubveniunt jura.*

9. If the Commiſſioners do not make an equall contribution to all them that come in and notifie their debts, and ſeek relief, all that they do otherwiſe is without Authority and void.

10. If a man enter into a ſtatute, and it be extended, and then he become Bankrupt, and after a *Libertate* is ſued forth, this Land thus taken in execution ſhal not be ſold by the Commiſſioners amongſt the Bankrupts Lands: So if he bargain and ſell his Land and before Inrolement become Bankrupt, this Land ſhall not be ſold by the Commiſſioners; but if he make a Feoffment and a Letter of Attorny to give livery, and before livery of Seiſin given become Bankrupt, this is a Countermand of the livery of Seiſin, and this Land may be ſold by the Commiſſioners, *Curia. B. R. 4 Car.*

Vi: Baron & Feme. Divorce. Remainder. Rent. Heir.

CHattels, or Cattals are all poſſeſſions of Goods moveable and unmoveable, except ſuch as are in nature of a Freehold, or parcell of it: And theſe are either reall or immoveable, which are ſuch as do not immediatly appertain to the perſon, but either to ſome other thing by way of dependance; as a Box with Writings of Land, the body of a Ward, the fruit of a Tree, or the Tree it ſelf upon the Land, or are iſſuing out of things immoveable, and of a more reall nature; As Leaſes for years, at Will, Wardſhips, the Eſtates of Gardeins in Chivalry, which hold the Land for the ſingle or double value, the Eſtates of Tenants by Statute-Merchant, Staple, or Elegit, and Grants of the next Advowſon, or elſe they are perſonall and moveable (*i*) ſuch as are moved by others, as Mony, Plate, Gold, Silver, Jewels, Utenſils, Houſhold-ſtuff, Debts, Wood cut, Corn, Emblements, Hay, and the like, or ſuch as move themſelves, as Cattell, and the like, and therfore called perſonall, either becauſe they are ſuch as do immediatly belong to the perſon of a man, as a Horſe, &c. or becauſe being detained from a man, he hath no means

Chattels or Cattals.

to

to recover them but a perſonall Action, and therfore are ſayd to be moveable, becauſe one may move them, and make them to follow a man from one place to another; and all theſe one may deviſe by his Will, or if he dye they ſhall go to his Executors or Adminiſtrators: Both theſe kinds of Chattels alſo are either in poſſeſſion, as when one hath his Ward or his Goods in hand, or in Action, which is where one hath not the thing it ſelf, but an Action to recover it, and then it is called a Choſe in Action, *Terms ley. Stawf: pr: cap.* 16. *Stat:* 1 *Eliz: cap.*2. *Coo. ſuper Litt: fol.*42. 118 *Plow:*192. *Dyer* 277. 5. *Coo:* 465.3.12. *Perk: ſect:*60. *F:N:B:* 128.

How they are regarded in the Law.

Chattels are not ſo much regarded in Law as Inheritances and Free-holds, nor Chattels perſonall ſo much eſteemed as Chattels reall: and therfore it is they will ſo eaſily veſt in a man and deveſt again, and deveſt and veſt again, for *de minimis non curat lex.* Hence it is, that no Precipe will lye againſt a Leſſee for years, that hath only a Chattell, for the baſeneſs of his Eſtate, *Coo.*8.95. *Dyer* 25.163.298.30, *Coo:*8. 171. *Plow:* 418.

If a Leaſe for years be made on condition, that if ſuch an act be done, it ſhall be void, it will be made void without Re-entry, 24 *Ed.*3 54.8 *Ed.*4.3.

A Traytor or Felon after the offence done, and before conviction, may ſell any of his Chattels reall or perſonall, *bona fide*, to maintain himſelf: An Officer of the King that is an Accountant may ſell any of his Chattels, *bona fide*, after he is become an Accountant and a Debtor to the King, and the Kings Debt will not reach it: They will veſt in the King where they be forfeit, and the Kings Officer may ſeiſe them without any Office found. If an Obligation be made to two, and one of them releaſe the whole Debt to the Obligor, the other is without remedy; But in caſe of Inheritances and Free-holds the Law is otherwiſe in theſe caſes.

Where a chattell lawfully veſted, ſhall after be deveſted and defeated. Where not.

Chattels will eaſily veſt and deveſt; as if one that doth hold Land in *Capite* doth mortgage it, and the Mortgager dye, his Heir being within age, and the King ſeiſe the body and land, and after the day the Mortgager redeem the Land and re-enter; now the Wardſhip is loſt again: So if he make a Feoffment

ment to the uſe of the Feoffee and his Heirs, untill the Feoffor ſhall pay to the Feoffee or his Heir a hundred pound, and that upon & from the day of payment of the hundred pound, the Feoffee and his heirs ſhall ſtand and be thereof ſeiſed, to the uſe of the Feoffor and his heirs, and that then and thenceforth the Feoffor ſhall re-enter, *&c.* and the Feoffee dy his heir within age, and after the mony is paid, the Kings Title to the Wardſhip is defeated, *Dyer* 369. *a. Dyer* 298. *b.*

A Wardſhip hapned to the Biſhop of *Durham* by a Tenure of him in *Capite*, and before any Seiſon by him of body or land, the Biſhopprick became void, and a new Biſhop is made. It is adjudged that the Executors or Adminiſtrators of the Predeceſſor, as a Chattell-veſt, and not the King, nor the ſucceeding Biſhop ſhall have this Wardſhip; But if a Biſhop ſeiſe a Ward, after it happen and dye, his Executor ſhall have him, *Dyer* 277. 2 *H.* 4. 19. 7 *H.* 4. 41. 44 *Ed.* 3. 42. *F: N: B:* 143. *e.*

If one give goods to his Daughter in marriage, and after they are divorced, the Wife ſhall have again the goods that are not ſpent, *Dyer* 13. *a.*

If a Waſt by a Guardian in Chivalry be found againſt him, wherby he looſe the cuſtody of the Land by the ſtatute of *Marlb: cap.* 4. yet the mariage is not deveſt, but he may ſtill maintain a forfeiture of marriage: So if Entry be for Mortmain, a Ward veſt ſhall not be deveſt, but the Abbot ſhall have the marriage, *&c. Dyer* 25. *b.*

The Husband and Wife are Joynt-tenants of a Tearm for years, and the Husband kil himſelf; now in this caſe all doth ſurvive unto the Wife, untill the office be found for the King upon the forfeiture, and then it goeth all from her to the King, *Plow:* 262.

If one recover by an erronious Judgment, and preſent to a Benefice, or enter into the Perquiſits of a Villain, and after the Judgment is reverſed by writ of Error; theſe collatterall things that are executed ſhall not be deveſted, *Co:* 8. 142. *b.*

If an erronious Judgment be given in debt, and the Sheriff by force of a *Fieri facias* ſell a Leaſe for years of the Defendants, & after the Judgment is reverſed for Error, now in this caſe the Tearm ſhall not be reſtored, but only the mony made

of it (a) But if the Execution be by Elegit, and upon it the Sheriff do by Inquisition extend a Tearm of the Defendants, and deliver to the Plaintiff in the Suit, and after the Judgment is reversed, in this case he shall have restitution of the Tearm it self, *Co.* 8. 142, 143. (a) *Adjudge in Pasche*, 15. *Iac: B: R: Burchurst & Mayo.*

And if a Sheriff by force of a speciall *Capias ut Iagamum* seise goods or Chattels, and sell them, and after the *Utlary* is reversed, here the party also shall be restored to all his goods and Chattels in kind, *Co.* 8. 143.

If the King do Knight a Ward that is in custody of his Gardein, by reason of a Tenure in *Capite*, or Knights-service; now hereby the Wardship of the body is devested, but he shall hold his Lands, and have the value of the marriage, *Co.* 6. 74, 75.

If a man be outlawed, and the King give away some of his goods, and after the King pardon him, and restore him to his goods; now the goods given between the Outlawry and the Pardon, shall not be devested, nor that gift avoyded by the Pardon. *Bro. Restitution* 18.

If a man dye seised of *Capite* Land, and it discend to his brother and Heyr an Infant, and the Lord seise the Ward, the Wife of the Tenant being privily with child of a Sonne, and after the Son is born: now the brother shall be out of Ward; but if the Son dye, then he shall be in Ward againe. *Bro. Gard.* 119.

If there be a presentment to a Church happen to a Tenant in tayle, and he dye before he present: now his Executor, not the issue in tayle shall present, for the Chattell is not devested: So if a Termer have a Presentment which doth happen during the Tearm, though he do not present, yet he shall have it. See more in the next questions following: And in divers other titles. *F. N. B.* 34. *& B. Park. sect.* 97.

What things shall be reputed as goods and chattels, and the Executors shall have after the death of the Testator, & what actions accrue to them for such things.

If a Parson, Vicar, Master of Hospitall, or any body politique be possessed of any goods or chattels in their own right, and dye, these are chattels that shall go to their Executors or Administrators, not to their Successors. *Co.* 4. 83. *Park. sect.* 58.

If

If a leaſe be made for years, or a Ward-ſhip, or the next Advowſon of a Church, or Covenant for payment of money, or the like be granted, or an Obligation made to me, and to my Heyrs: Yet in all theſe caſes I have this as a Chattel, and it ſhall go to my Executor, and not to my Heyr: So if any ſuch thing be made or granted to me and my Succeſſors, my Executors ſhall have it: And if the Heyr or Succeſſor get the Deed, the Executor may recover him from them. *Litt. ſect.* 740. 14 *H.* 4 24. 34 *H.* 6. 27. *F: N: B:* 120. *Brus. oblig.* 28. 68. *Fitz. Accomp.* 56.

If I have a Box, or Cheſt, or Trunck full of Writings at my death, and the ſame is open, not ſealed, or locked: now this ſhall goe as goods to my Executor: but if it were ſealed or locked, as incident to the writings, it would be the Heyrs whoſe the writings be. 22 *Edw.* 4. 7. 3 *H.* 7. 15. *Executor.*

If Charters be pledged to me for money, or granted to me, and I have no land that they doe concern: it ſeemeth this is in the nature of a Chattell, and my Executor, not my Heyr ſhall have them: But all ſuch Charters as concern my inheritance, ſhall go with my Heyr, and the land it ſelf they doe concern. 21 *Edw.* 4. 19. 18. 8 *Edw.* 4 3. *F: N: B:* 137. *Br. Chattle* 12.

If one ſeiſed of Land make a Feoffment of it to me (excepting the Trees) and after grant or leaſe the Trees to mee for years: Or if one make me a leaſe of land for ten yeare, and after make me a leaſe of the Trees for twenty years, to begin when the ten years are ended: In both theſe caſes I have the Trees in the nature of a Chattell, and they ſhall goe to my Executors after my death. *Co.* 4. 63.

If there be Leſſee for years, or life, of land whereon Tymber doth grow, or houſes be, and the Leſſor, Leſſee, or a Stranger cut downe any of the Timber (unleſſe it be where the Leſſee doth but what the Law doth allow him) in this caſe the Leſſor ſhall have this as a Chattell, which ſhall goe to his Executor after his death: So alſo if the houſes or Trees be proſtrate by the act of God: And if the Leaſe for years or life be a leaſe made without impeachment of Waſt, in which caſe the Leſſee is to have the tymber and trees in the caſes be-

fore; the Leſſee hath them as a Chattell, which ſhall goe to his Executor. *Coo.* 4.63. 11.81.84.

If a man that hath the fee-ſimple of ground whereon be trees growing, ſell me all, or ſome of the trees, and I dye, or he and I before they be cut, or I ſell the land excepting the trees, in the firſt caſe my Executor, in the laſt caſe his Executor ſhall have them in the nature of Chattels, albeit they be not cut down. *Coo.* 11.50. *Perk. ſect.* 58.

If one be poſſeſſed of a tearm of Land, and deviſe it to *A.* for life, the remainder to *B.* for life, whereby *B.* hath only a poſſibility; now if *B.* dye, his Executor ſhall have this poſſibility in the nature of a Chattell. *Coo.* 8.55. 10.47.

So much of my wives apparell as is neceſſary and convenient for her condition and ſtate, as her goods, ſhe may diſpoſe at her death, or take after my death; but the reſt, as my goods ſhall go to my Executor. 33 *H.6. fol.* 31.

If a Feoffment, gift in tayl, or leaſe for life be made by one rendring Rent, and the Rent is behind, and I dye: or a Rent be granted out of Land to me in fee for life or yeares, and it be not paid to me in my life time, it ſhall goe to my Executors in the nature of a Chattell. *Stat.* 32 *H.* 8.37. *Dyer* 375. *Coo.* 4 48.49.

If a Rent be granted to me, my Heyrs and Executors, during the life of *I. S.* and for one half year after: now this half years Rent after my death ſhall goe as a chattell to my Executor. *Curia M.* 7. *Jac. Co. B. Wallis caſe.*

If one ſeiſed in fee make a leaſe for years, rendring Rent, and deviſe this Rent to a ſtranger by years, and the Deviſee dye, now it ſeems the Executors, and not the Heyr of the Deviſee ſhall have it as a chattell. *Dyer, fol.* 5,6.

If one poſſeſſed of a Tearm deviſe the land to *A:* for life, the remainder to *B:* now this is a chattell (though it be but a poſſibility) in *B:* which if he dye, his Executor ſhall have it: But if it be a remote poſſibility, where an eſtate is to be reduced to a certainty by a Contingent precedent, and it doth not reſt in the Teſtators life time. *Coo.* 8.51. 10.47. *Prices caſe, Trin.* 10. *Jac. B. R.*

If any perſon that is Tenant for their own, or anothers life, make

make a Leaſe to me for one hundred yeares, this is a chattell which ſhall goe to my Executors, and is in judgment of Law, but a leaſe for ſo many years, if he for whoſe life it is held, do live ſo long. *Coo:*7.12.

Where by the Statute of *Weſtm.* 1. the Lord ſhall have the Wardſhip of his Heyre Female, being of the age of fourteen years at the time of the death of her Anceſtor for two years; if he dye within the ſame two years, his Executors ſhall have it: 27 *H:* 8. 3. *Coo: ſuper Litt:*79.

Alſo if the Lord hath the ward-ſhip of the body and land of an Heyr female, and maketh his Executor, and dyeth before her age of fourteen years, in this caſe alſo the Executor (as it ſeems) ſhall have the two years as he hath the ward-ſhip of the body and lands. *Coo:ſuper Litt:*79.

If a man make a Feoffment in fee upon condition that the Feoffee ſhall pay an hundred pounds to the Feoffer his Heyrs or Aſſigns, (or his Heyrs, Executors, or Adminiſtrators) at ſuch a time: now in theſe caſes the Executor ſhall have this money as a Chattell, if it be payd by the Feoffee. *Coo.* 5.96, 97. *Fitz. Condition* 8.

If a man grant to me the two next Preſentations of the Church of *D.* theſe are Chattels; and if I dye, my Executors ſhall have them. 34 *H.*6.27. *Br: Chat:*

If a Parſon have an Annuity in fee in the right of his Church, and it is behind, and the Parſon dye, the Executors, and not the Succeſſor ſhall have theſe arrearages as a Chattell. *F:N:B:*120 *l.*

If a man ſeiſed of land, and poſſeſſed of a ſtock of Cattell, leaſe it to others for years, and the Leſſees covenant to pay an hundred pound by the yeare to the Leſſor, or his Wife their Heyrs or Aſſignes during the tearm, and an hundred pound at a day for a marriage portion of his daughter, and dye, now the Wife, & after her death her Executor, not the Heyre of the Leſſor ſhall have this Rent. *Dyer* 275, 276.

If a man make a leaſe for life, rendring Rent, and dye, now the Executor, not the Heyr ſhall have the arrearages of Rent due in the life time of the Teſtator. *Dyer* 375. *Coo.* 4. 50. *Fitz. Executors* 112. 98.

If

If there be in a Cheſt or Box, wherein are writings (which appertain to the Heyr *ut ſupra*) plate or any other goods, theſe do belong, and ſhall goe to the Executor, and not to the Heyr. *Fitz. Execut.* 111.

If a man find treaſure, the owner whereof is knowne, and he dye before he have it, yet the Executor of him whoſe it is ſhall have it. *Fitz. Corone*, 446.

If I be outlawed, and my goods forfeit, and dye, and my Executor reverſe the Utlarie for error, now he ſhall have all theſe Chattels and goods that were ſo forfeit.

If I being Guardian doe indow a woman that hath title of Dower out of the Land, and after I dye, my Executor ſhall have the ſervice due from the woman, during the minority of the Infant. *Fitz. Dower* 138.

If I be Lord of a Mannor, and a Fine certain or incertain be aſſeſſed upon the admittance of a Tenant, this ſum of money aſſeſſed (as it ſeems) is a Chattell in mee which ſhall go to my Executors if I dye.

If a man have Judgment for Land in a reall or mixt action, or damages, and dye, now the Heyr ſhall have execution of the Land, and the Executors ſhall recover the damages: So if a man recover damages for detaining of Charters, and dye, the Heyr ſhall have the Charters, but the Executor the damages; but the Executor ſhall not have execution for the damage before the Heyr have ſued a *Scire facias* for the Charters. *Fitz. Executor*, 32. 139.

The Executors ſhall have a Raviſhment of Ward; for a Ward took away in the time of their Anceſtor, *per Statute of Ed.* 3. for goods taken away in the life of the Teſtator, this is a Chattell therefore in them: So if the Teſtator had a leaſe for years, or an intereſt by Statute or *Elegit*, and be ouſted, and dye, the Executor may have an *Ejectione Firmæ*: So if the Teſtator bring an Accompt, and the Defendant ſay *ne unques ſon bailiff*, and it be found againſt him, and after Judgment the Plaintiff doth dye, this action ſhall ſurvive to the Executors: So if the Teſtator have recovered any Debt or Damages in any perſonall action, this as a Chattel ſhall go to the Executor: So all cauſes of Action and Suits ſhall go to the

Executor,

Executor, and not to the Heyr, wherefore see more in *Executor*, in Master *Barker*, *Assurances*, the very same question in effect with this. *Fitz. Entent.* 52, 53. 59. 84. 117, & *Account*, 56.

Regularly all those things which shall not be forfeit by Utlary in a personall Action, nor be attached in an Assise, nor distrained for Rent, are not reputed Chattels, neither shall go to the Executor, but to some other. Also whatsoever it will not be felony to steale, as

where not, but the Heyr or some other shall after have them.

All the incidents of a house, as glasse of the windows annexed to the windows by nayls or otherwise, all the wainscot about the house fixed by nayles, screws or irons put through the posts, or walls, Tables dormant, Furnaces of lead and brasse, and Fats in a Brew-house, or Dye-house standing and fastned to the walls, or standing and fastned to the ground in the middle of the house (though fastned to no wall) A Copper or Lead fixed to the house, all the doors without & within, whether they be set up at the charge of the Lord or Tenant, shall go with the house to the Heyr, or him that is to have the house, and not to the Executor of the Tenant as a Chattell: Also trees standing, and grasse growing, is parcell of the Inheritance, and not as Chattell, to go to the Executor, or Administrator. 20 *H.* 7. 13. *Kelw.* 118. *Coo:* 4. 63, 64. 21 *H:* 7. 26. 4 *H:* 7. 10 *Kelw.* 86. *Dyer* 273 *b. Coo:* 4. 65.

Also Pales, Walls, and stakes, Deer, Conies, Pheasants, Partridges, and the rest of the Game of a Park, shall go with the rest of the Park as parcell of the Free-hold, and incident and concomitant thereunto, and not as a Chattell to the Executor. *Cook:* 7: 17: 32 *Edw:* 4: 7 *Henry* 7: 15. 10 *Henry* 7. 6.

Also the fish in a Pond are not reputed as Chattels, neither shall go to the Executor, but shall go with the Pond: So also the Pigeons of a house shall go with the house. *Kelw.* 118. 18 *Edw.* 4. 8.

If Land or Rent be granted to one and his Heyrs during the life of another; now after the death of the Grantee, his Heyrs shall have this Estate, and not his Executors as a Chattell. *Litt: fol:* 739.

If

If one seised of Land wherein are trees in fee, and make a Feoffment of it (excepting the trees) and after sell the trees to the Feoffee absolutely, or grant them to him and his heyrs, in this case the trees are re-united, and parcell of the Inheritance, and are no Chattels, nor shall go to the Executors: And if a man seised in fee of such land make a Lease for life or years (excepting the trees) these trees are no Chattels in the Lessor, neither shall go to his Executors, but to him that hath the Land. *Coo:*4 63. *Coo.*11.48.

If there be Tenant for life, the Remainder in fee of a Tenancy, and the Lord grant his Seigniory for life: And after he in remainder in fee of the Tenancy dye his Heyr within age; and after the Lord dye, and after the Tenant for life dye; now in this case the Heyr of the Lord, and not his Executor shall have the wardship. *Coo* 2.93.

If the Kings Tenant by Knights service in Capite be seised of a Mannor whereunto an Advowson is appendant, and the Church become voyd, and the Tenant dyeth, his Heyr within age, the King that hath the Wardship, shall have the presentment, and not the Executor as a Chattell: But if the land were holden of a common person, the Executor, and not the Guardian should have it. *Coo. super Litt.* 388.

If a lease be made for years, rendring Rent at *Michaelmas*, or within ten dayes after, and the Lessor during the Tearm happen to dye after *Michaelmas* before the ten dayes expir'd; now in this case the Heyr of the Lessor, and not his Executor shall have this last years Rent due at *Michaelmas*. *Hil.* 7 *Jac. per totam Curiam in B. R. & H.* 9 *Jac.*

Office Judiciall, Ministeriall.

If any office of trust, Judiciall or Ministeriall, being for the administration of Justice, or the like be granted unto me for years, or to me, my Executors and Administrators for years, yet this is no Chattell which my Executor or Administrator shall have after my death; for it is personall, and dyes with the person. *Coo.*9.96,67.

If one have a Ward-ship as Guardian in Socage and dye, his Executors shall not have it, for it is personall. *Plow.* 293. *Coo.* 5. 39.

If

If the Father have the Ward-ship of his Son and Heyr apparant, *jure naturæ*, this is no Chattell in him which his Executor shall have after his death; for the Custody is inseparably annexed to the person: As if there be Lord, and a woman Tenant by Knights service, and the Tenant doth make a lease for life, and after the Lord and Tenant do enter-marry, and have Issue between them a sonne, and the Wife dye, and after the Father doth dye, the son within age, his Executors shall not have this Ward by reason of the Seigniory. 33 *H.* 6. 55. *Coo* 3 39.

Where the Father hath the wardship of his heyr apparant jure naturæ, it is no Chattell.

In some cases things that are in their nature but Chattels, yet shall not go to the Executors, as certain Jewels, *&c.* of the Kings of *England*, that shall not go to the Executors of the King, but succeeding Kings: So also if the King have the Temporalties of a Bishop, all wardships and presentations happening by reason thereof, shall go to the succeeding King, not to the Executor; Also by the custom of certaine places, Heyrdoms, and a reasonable part of the goods may go to others from the Executors. 11 *H.* 4. 7. *Broo. Chattels* 2. *F. N. B.* 122. *Fitz. Dett.* 51. 52. 38. 60.

Where Chattels shall not goe to the Executors, but to the heyrs or Successors.

If a Mayor and Cominalty, Dean and Chapter, or any other Corporation have Goods or Chattels in the right of their Corporation; though they change not their nature hereby, yet they shall not go to the Executors, but to the Successors in the Corporation: But if a lease be made to a Bishop and his Successors for years, his Executors or Administrators shall have it as a Chattel, but in *auter droit*; for regularly no Chattell can go in succession in case of a sole Corporation. *Coo.* 4. 65. *Coo super Litt. f.* 46. *b.*

If goods be given to a woman in marriage, and the Husband and Wife be after divorced; now in this case, though these goods change not their nature; yet they, at least those that remaine shall come back to the Wife, and shall not be the Husbands any longer, or goe to his Executor after his death. *See Divorce.* 26 *H.* 6, 7. *Broo. Chattels.* 1.

If a man grant a Rent in Fee, and grant over that if the Rent be behind, *&c.* that he shall forfeit twenty shillings *nomine pœnæ* to the Grantee and his Heyrs: now if this Rent be

behind, and he dye, the Heir, not the Executor shall have and recover this Rent and Penalty, and he may have an Action of debt for it; But if an Annuite or Rent be granted to one for his life, or years, and he dye, his Executor shall have and sue forth for him and his Heirs Arrearages incurred in his life time, *E. K. B. 120. M. Fitz. Covenants 17. Fitz. Executors 99.*

If a man make a Feoffment in fee of land, and the Feoffee covenant to do something to the Feoffor and his Heirs *& quotiès defectus fuerit, &c.* that he shall forfeit to him and his Heirs five pounds; now upon default, the Heir and not the Executor shall recover this penalty, *Dyer fol. 22. a.*

If a man seised of a Mannor in fee, and have a Relief due to him upon the death of a Tenant, and he dye before it be had, it seems the Heir not the Executor shall have it; but if the Lord were only seised of an Estate for life, or had a Lease for years of the Mannor, *Contra*, *See somewhat more in the Question following, where Estate of Free-hold may be of a Chattel present. Dyer fol. 24.*

Emblements. To whom they shall appertain, and who shall have them.

Emblements strickly are the profits of land which hath been sowed (which in some cases he that soweth the land shall have, and in some cases not.) But the word is sometimes used more largly for any profits that arise and accrue naturally from the Ground, as Grass, Fruits of Trees, Hemp, Flax, and the like; *Terms lex. Kelw. 125. Co. super Lit. 55.*

If a Tenant in Fee-simple or Fee-tail sow the land, their Executors after their death, if they dye before cutting, not their Heir shall have the Emblements, *Merton cap. 2. 37 H. 6. 25.*

If one have land in Fee-simple, or otherwise in his own or wives right, or be estated in land for years in the right of his wife, and he sow it with Corn, and dye before it be reaped, in this case the Executor of the husband, not the wife, or heir shall have it.

And so it seems of planted Hops, Saffron, and Hemp; *quicquid plantatur solo, solo cedit.* But Grass, Apples, Pears, and other fruit upon the Trees, though ripe and ready to be cut, shall go to the heir with the land: But all these of both sorts, if the land in which they grow be sold away and not excepted

cepted paſs with the land. The roots of Carrets, Turneps, Parſnips and Skirrets are diſputable, *new Book of Executors.*

If a Diſſeiſor, or a Diſſeiſor of a Diſſeiſor, or a Feoffee, Donee, or Leſſee, of the firſt or ſecond Diſſeiſor, ſave the land, and cut and carry the Corn away, or cut and carry away the Graſs, or Trees, or gather and carry away the Frut, as Apples, Nuts, or the like, or give or ſell away any of this (unleſs it be in a Market or Fair, *&c.*) yet when the Diſſeiſee doth re-enter, he ſhall have it all again, and may take it wherſoever he doth find it, for the property of it is ſtill in him, and if he dye his Executor may do the like: And if they be gone or ſpent, the Diſſeiſee may have an Action of Treſpaſs for them againſt the Diſſeiſor, but not againſt his Leſſee, Feoffee, or Donee, which come in by Title, *Co.* 11. 51. *Dyer* 31. 173. 12 *H.* 7. 25. *Perk. ſect.* 519. *Co.* 5. 85. *Treſpaſs.*

If a Tenant for his own or another's life ſow the land, and after dye, his Executors, and not him in reverſion ſhall have the Emblements: And ſo is the Law for any particular Tenant that hath an Eſtate uncertain; but if a Tenant for years ſow the Land, and before that he hath cut and ſevered the Emblements from the land, his Tearm expireth, there the Leſſor or he in reverſion, and not the Leſſee or his Executors ſhall have the Emblements: But if Leſſee for years of the Tenant for life ſow the land, and the Leſſee for life dye before he can reap, yet the Leſſee for years ſhall have the Crop: So if a man ſeiſed of lands in fee hath Iſſue, a Daughter, and dyeth, his wife being enſeint with a Son, and the Daughter ſoweth the grounds, and after the ſon is born, yet the Daughter ſhall have the Emblements, 10 *Aſſ. p.* 6. *Lit. Sect.* 68. 7 *H.* 4. 13. *Co.* 5. 106. 7. *Aſſ. p.* 19. *Dyer* 310. 16 *H.* 6. 6.

If a woman Copy-holder during her Widdow-hood, according to the cuſtome of the Mannor ſoweth the land, and before the ſeverance of the Emblements ſhe taketh a husband, the Lord ſhall have the Emblements: So if ſhe make a leaſe for years, and the Leſſee ſow the land, and then ſhe take a husband, there the Lord, not the Leſſee ſhall have the Emblements, though the Leſſee Eſtate be determined to the act of a ſtranger. *Co.* 5. 106. *& ſuper Lit.* 55. 6.

If the wife have a leaſe for years of land, as Executor to a former husband, and her preſent husband ſow it, and dye, in this caſe the Corn at leaſt ſo much as is more then the value of the land, ſhall go to the wife not to the Executor of the husband. *New book of Executors.*

If a Leaſe be made to the husband and wife during the Coverture, and the husband ſoweth the land, and after they are divorced *cauſa precontractus*, the husband not the Leſſee ſhall have the Emblements.

If one ſeiſed of land in the right of his wife in fee, or for life be, and he, or his Leſſee for years ſow the land, and before the Corn be cut, the wife dye, or the husband dye; now in the firſt caſe the husband or his Executors, and the laſt the Leſſee, or his Executors if he dye, ſhall have the Emblements. (*a*) But if the husband and wife be Joynt-tenants of land, and the husband ſoweth the ground, and the land doth ſurvive to the wife, here it ſeems he ſhall have the Corn, and not the Executors of the husband, but the husband might have given or diſpoſed them. 7 *H.* 4 17. 7 *Aſſ. p.* 19. *Bro. Embl.* 6. *Coo. ſuper Lit.* 55. (a) *Aſſ.* 21. *Dyer* 316.

Where one doth enter into land by a right *Paramount*, or the Leaſe or Eſtate doth determine by the act of the Leſſee, or by his means that did ſow the land, or by the means of him under whom he claimes, in this caſe although the Eſtate of the Leſſee be incertain, yet he ſhall not have the Emblements: As if one enter upon or recover land, ſaved by vertue of a condition in Law, or in Deed, as if the Leſſee for life or years do alien in fee, or commit waſt, and he recover the Land or a Feoffment, or Leaſe be made on Condition and the Condition be broken; or the Lord of a Copy-holder enter for a forfeiture of the Tenant, or a Lord enter on his Villains land, or the King, or Lord enter upon the land of his Tenant after a Felony done for a forfeiture: In theſe and ſuch like caſes, he that entreth upon or recovereth the land, ſhall have all the Emblements that are growing and not cut upon the land at the time of his entry or recovery: So if a man recover land by a ſuit upon a right, and be put in poſſeſſion by an *Habere facias Seiſinam*, or *Habere facias poſſeſſionem*, he ſhall have all

the Emblements that ſhall be then growing upon the land, *Fitz. treſpaſs.254. 44 Ed.3.25. Co.5.106. & ſuper Lit.55.b. Co.4.21. Perk.ſect.515.40. Ed.3.5. 19 H.9.45. Stamf: lib. 3. 301. Co. 5. 111: Bro: Emblements 8.*

And yet if a Feoffment be made upon condition, and the condition is broken, and the Feoffee before the entry of the Feoffor cut the Corn ſowed on the ground, and after ſuch ſeverance the Feoffor re-enter, in this caſe not he but the Feoffee ſhall have the Emblements, but if he had entred before, he ſhould have had it: So if a Copy-holder after forfeiture and before entry of the Lord cut the Corn, he ſhall have that which is cut, *5 H.7.17. Bro. Emblements 4.*

If a man leaſe land at will, and the Leſſee doth ſow the land with Corn, or ſet Roots, or ſow Hemp or Flax, or any yearly profit, and the Leſſor determine the will, before it be ripe and ouſt the Leſſee; now in this caſe the Leſſee ſhal have the Corn, and if he dye his Executor ſhall have it; But if the Leſſee himſelf determine the Will, he ſhall not have the Emblements, but the Leſſor: And if ſuch a Tenant at will plant young Fruit Trees, or young Oakes, Aſhes, Elmes, *&c.* or ſow the grounds with Acorns, *&c.* he ſhall have no profit of theſe, for this doth not bring any yearly profit; So if he or any other Tenant that ſhall have Emblements, do only eare and dung the land, they ſhall have no benefit by this, *Co.5.116. & ſuper Lit. 55 18 Ed. 4 18. Litt. ſect. 68. Co. 5. 116.*

If a Tenant by Statute-merchant ſoweth the ground, and then a ſudden and caſuall profit, by which he is ſatisfied, yet he ſhall have the Emblements, *44 Ed.3.15. Co. ſuper Lit. f. 55. b.*

If Tenant at ſufferance be diſcharged, and notwithſtanding he continue in poſſeſſion and ſow the land, and the Lords Baily take the Rent at our Lady day after, and payeth to the Lord in a groſſe ſum with other monies, now it ſeems in this caſe the Tenant, and not the Lord ſhall have the Corn at Harveſt, *Cromp. Jur. 215.*

If a man under colour of a Feoffment or Leaſe, preſuming he hath a good Eſtate, when in truth he hath none, ſow the land; now in this caſe neither he nor his Executor, but the Feoffor

Feoffor or Lessor shall have the Emblements, *Lees case 9 Ber.*

If two be Tenants in Common, and one dye, and his wife hold in Common, and sow the land, and dye, the other Tenant in common, or the Heir shall not have it, but the Executor of the woman, *Perk. Sect.* 523.

If a Lease be made to a husband and wife at will, and they be afterward divorced *Causa præcontractus*, and the land be sowed before; now in this case the husband and not the Lessor shall have the Emblements, *Cio.* 5. 116.

If a Tenant in Dower sow her land, and dye before severance of the Corn, the Heir shall not have it, but the Executor of the wife. And if after the sowing she take a husband, and he dye before it be cut, his Executors shall not have it, but the wife shall have it. If a Feme-sole sow her land, and after marry, and he dye before severance, the wife not the Executor of the husband shall have it, *Broo. Emblements* 26. *Stat.* 20 *H.* 3. *cap.* 2. *Perk. sect.* 522. *Broo. Emblements* 26.

If a Parson dye before the first day of *May* when the land is sowed, and another Parson is made, the Successor shall not have the Tenths, but the Executors or Administrators of the first Parson; but if he dye before the Conception of the Virgin *Mary*, the Successor shall have the Tenth of the Emblements: But now by the Statute of 28 *H.* 8. the profits are to be sequestred from the death of the Parson, and to be delivered all to the Successor, only the Corn sowed upon the Glebe Land by the Predecessor, which he may dispose by will, and if he do not, it seems his Executor shall have it, 21 *H.* 6. 30. 34 *H.* 6. 33: 35 *H.* 6. 39. 28 *H.* 8. *cap.* 11. *Stat.*

If a man be outlawed in a personall Action, the King, not the party or his Executors if he dye, shall have all the Emblements on his ground at the time of the Outlawry: So if a man forfeit his Goods in case of Felony by flight, though he be after acquitted, or being convicted the King will have all the Emblements at the time of the flight in the first case, and Felony done in the second case, or at any time after (as it seems) untill conviction or acquittall, 5 *H.* 7. 16. *Fitz. Coronæ* 344.

Tithe. If Corn be reaped and the Tithe not set out, and the Inheritor

tion of the Tithe dye, it seems the Executor nor the Heir of the Inheritor shall have the Tithe, *New Book of Entries.*

But note that in all these cases where a man hath right to Emblements and dies, if he make any devise of them, then they shall go according to his will and disposing, *Vide Testaments, Dyer 316.* *The remedy to recover them.*

And in all those cases before he to whom the Law doth give the Emblements, may lawfully enter into and upon the land or ground where they grow, and cut and carry them, and he is not put to his Action for them, nor bound to take them are they be ready, or at one time, but the Law doth give him convenient entry of Ingress, Egress, and Regress; And if he be disturbed in this way, he may have his Action of the case, and shall recover as much as he is damnified. *Quando lex aliquid alicui concedit, concedere videtur & id sine quo res ipsa esse non potest.* And if a man that hath right to these Emblements have any trespass done to him in them, he may have an Action of trespass for it, *Coo. super Lit. 56. Kelw. 125. Kelw. fol. 100. a.* *Action of the Case. Tresp.*

If a Lease for years of land be, &c. *See it in my Book of common Assurances f. 469.*

If a man be possessed of a Tearm or Lease for years, and do by will devise it to one for life, and after to another for life, or for the residue of the years: these devises are good, and the Devisees shal have it accordingly, and the Executor of him in Remainder after his death, shall have this possibility as a Chattell, and he that hath the first Estate cannot bar him of the next, but not as a Free-hold, for the quality of the Estate is not hereby changed; But if such a conveyance were by Deed, in this case he to whom the first Estate were limited, would have all the whole Tearm, and they that are to come in the Remainder would have nothing. So also such a devise by will of a Chattell personall will (as it seems) be void to him in Remainder. *But Quere of this, and see Plac. Divise Contrà, Co. 8. 95. 10. 47. Plow. 525. Dyer 358. Brow. Chattels 21.*

But if a man be possessed of a Tearm, and do devise it to one and the Heirs of his body, the Remainder to another, this devise

devise is void to him in Remainder, and the first Devisee and his Executors shall have it all the time, and if he devise to one of his Heirs, the Devisee hath no Free-hold, but it shall go to his Executors as a Chattell, *Co.* 10. 87. *Walts & Gouldstons case. M.* 19. *Jac. Co. B.*

If a man be possessed of a Tearm or Lease for years of land, and grant a Rent-charge out of it to *I.S.* for his life, or in fee, this is a good grant, and the land shall be charged during the Tearm only, *Co. super Lit.* 147. *b.*

If one that hath a Lease for years enter into a Statute, and Execution be sued therupon, and the Sheriff extend the Lease, and deliver it to the Conusee at a yearly value, as he may either sell it out right or extend it at a yearly value, which he will; this is no Frank-tenement in the Conusee, but a Chattell still.

If a Te mor grant all his Estate to *A.* to the use of himself and his wife for their lives; In this case neither the Termor or his wife hath any Free-hold, for the Statute of 27. doth not execute the possession to this use: And therfore if he or his wife grant this to another, there grant is void, for the whole interest in Law is in *A. Dyer* 369. *a.*

If a Lease be made to *I.S.* for forty years, if he live so long; And if he shall dye within the said Tearm, that his wife shall have the residue of the Tearm; now this is no Free-hold, and by the death of *I.S.* the Lease is ended, and therfore the Remainder to his wife is void, *Dyer* 253. *b.*

A man may have an Estate of Free-hold or Inheritance in other things as well as Lands, Rents, Commons, and such like, as in a Robe or Garment, Bread, or Drink, or the like, *Vide Corodi, & Fitz. in Assise.*

If Land or Rent be granted to one and his Heirs, during the life of *I: S:* in this case after the death of the Grantee his Heir not his Executor shall have it, *Lit. sect.* 739.

And regularly all other things which are not forfeited by an Outlawry in a personall Action, nor attachable in Assise, nor distrainable for Rent, nor the taking away wherof will be no Felony; they are not to be reckoned Chattels that shall go to the Executor, 20 *H.* 7. 13: *Kelw.* 128.

Things

Things in Action bordering so near upon, and having so intimate a relation to an affinity with all the Titles we have already handled, we must of necessity ere we give over, say something to it. *Things in action*

Things in Action is when a man hath cause, or may bring an Action or have other remedy for some thing due, or some wrong done to him. As a right or title of entry into Land, which another hath an Action of Debt upon, an obligation, or Annuity, or Rent, or Action of Covenant: or an Assise upon a Disseison, *Ejectione firme* upon an Ejectment, a Ravishment of Ward, upon the deteyning of a Ward: Trespass of Goods taken away, beating or the like. And because they are things whereof a man is not possessed, but for recovery of them is driven to his Action, they are called Things in Action, or the possibility of a thing. And this is either Certain(*i*) when the demand is certain, as in case of debt, or Incertaine (*i*) when the demand is of a thing incertaine, as in Actions of Trespass and the like. And these choses in Action, also are some of them personall, as Debt, damages and the like, and some of them are mixt, as Wardships. And some are reall, as Rights, Titles, of Entry or Action, and the like. *Termes ley: Finches ley. fol. 27. Broo. Patents 98.* *Quotuplex.*

The nature thereof.

These things in Action or causes of Suits, as Entryes to continue ones Right, or upon a Title possibilities, and the like, or of that nature, as that regularly they cannot be given nor granted, nor yet transferred from one subject to another, by act of Law. As a right of Action will not come to the Lord by Escheat; and if an obligation had been made to a villain, and the Lord seise him he shall not have nor can recover this debt, but in the villaines name; nor yet be given or granted by act of the party from one man to another: And therefore if a man have a debt due by Especialty or otherwise he cannot grant or assign it to another, save only in some speciall cases, but he may repute another to sue it for him, and in his name, or by agreement promise it to another when it is recovered, or he may grant, give or assigne, the especialty it self, and so deprive himself of the means to recover it, as hath been often adjudged, but such things may be extinct by release or confirmation,

firmation, &c, but this must be alwayes between the parties themselves. For no strangers but parties themselves and privyes(i) Heirs, Successors, Executors, and Administrators, can take advantage of them, unless it be in speciall cases. As where a man is Executor, or where is a grant of a Reversion, (For which see the Stat. 32. *H.* 8. *cap.* 8. *& vide infra.* And this the Law doth provide to avoyd multiplicity of suits, and subversion of Justice, which would follow if these things were grantable from one to another, 1. *H.*6 4. *Coo:*10.48.22. *Ass:* p.37. *Dyer* 30:*b*·39. *H.*6.26. 34 *H.*6.30. *Fitz. Maintenance* 14 *Plow.*185.*b.*

Where & what things shall be reputed things, in the nature of things in action and not grantable.

Whatsoever comes under the definition of Action: (For which see Action) or is a Chattell only in Action, (for which see above) as all causes of Suit for any Debt, or duty, trespass or wrong, are to be accounted Choses in Action: Also if I have a Judgment against another man for money, or a Statute for money: These are Choses in Action. So also if I have an Annuity to me in Fee, for life, or years, it seems this is in nature of a Chose in Action: and not grantable. But *Quere* See *Fitz. Grant* 45. For it seems an Annuity in Fee to me and my Heirs is grantable. *Broo: Adjudge* 16. *Coo.*5 89.90.

If a man have Advowson & the Church be voyd the presentation to it, is in the nature of a Chose in Action, & cannot be granted by a common person, but might in the case of the King But in this case, if the Patron grant the next presentation when it shall be next voyd, the Grantee it seems shall have the next avoydance after this. *Broo. Chose in Action. Dyer* 296 *Fitz. Grant* 50. *Dyer* 26.*a.*

Also a possibility of an interest or an estate in a Tearme of years, is somewhat neer in its nature to a Chose in Action, and therefore is not grantable from one subject to another, but this may be released to privyes and parties in the Estate. *Coo:* 4.66.*a.b.*

But if one sell to me and my assignes one hundred load of wood in his Wood to be taken by my assignment, this is more then a thing in Action, for it is interest which I may grant over, and if he refuse to assign it, I or my Assignes may take it without

without him. So if one sell me his wood in such a wood (except twenty of the best trees) and that I shall cut it within two years: this is an interest in me grantable over, and if he refuse to choose his twenty trees in reasonable time after I have requested him, I may cut down the wood, and leave him twenty trees: So if one grant me reasonable Estovers in his wood to be taken, by the view and delivery of his Bayliffe, this is an interest, and if his Bayliffe will not deliver it after request, I may take it without him. *Co.* 5. 25. 5. *Ed.* 3. 64.

when & what right of title, debt, duty, or thing in action may be given or granted over.

All Choses in Action personall that are certayne, that were the Kings originally, or that did come to him by Forfeiture from others, as Annuity, Debt, Ward, or the like might have been by speciall and apt words by his prerogative granted to any subject; and the Grantee might have sued for the same in his own name, albeit there had been no words in the Pattent to enable him so to do: And the course is to sue for them in the Exchequer. Also the King might have granted the presentation of a Church when it was voyd. *Dyer* 30. *Fitz. grant* 16 *Broo. Chose in Action* 2. 21. *H.* 7. 19. 39. *H* 6. 26. 5. *Ed.* 4. 8.

By the King.

The King might have given, assigned or appointed the obligations, that were made to him to his Heire or Executor at his pleasure, but so might not a common person. *Fitz. Grant.* 50. *Broo. Chose in Action.* 2 *Stat.* 33. *H.* 8. 39.

Also the King as it seemes might have granted over his Rent and his Condition of Reentry for not payment, or any other reall or mixt Chose in Action, which another may not do, but where a reversion is granted within the Statute of 32. *H.* 8. And if the King be indebted to others, he might have assigned over all, or part of a tenth for the payment of it to those he did owe it, or appoint it to be paid by his Customers. 2. *H.* 7. 8. *Per Hussey.* 1 *H.* 7. 8. *Broo. Patent.* 98. 5. *Ed.* 4. 8. *Dier.* 38. 43. 62.

By a common person.

But a common person regularly cannot give or grant any such Chose in Action (unless it be to the King, which he may do by Deed not inrolled) and if he do such gifts and grants will be voyd. As if an obligee give or grant his Debt and obligation, to another man, in this case he to whom it is given or granted, cannot have, nor recover the Debt in his owne

name, but he may cancell the Obligation, or deliver it up to the obligor. So if a man have a right or title of Entry into Land, he cannot give or grant this over to a stranger. As if a man disseise me of Land in possession or Reversion, and I grant my right of entry into this Land to a stranger. Or if I make a Feoffment in Fee on Condition, that if I do such a thing I shall reenter, this Condition or title of Entry, in the nature of a Chose in Action is not grantable over. But sometimes a Condition incident to a Reversion is grantable by the *Stat.* of 32 *H.* 8. *Coo.* 10. 48 *Coo:* 5: 89: 90: 21 *H.* 7. 15: *Fitz prerogative* 10. 2 *H* 7. 8: *Perk. Sect.* 86 280: *Coo.* 2: 56. *a.* 3. 4: *a.*

If a man have the Wardship of an Infant, and he is contracted to another in his minority, and then he grant the Wardship, and after the Infant is marryed: now in this case the Grantee shall have the Writ of Ravishment of guard: for this grant was good *Fitz Guard* 94.

If a man take away any of my Goods or chattells from me as a Trespasser: now it seems I cannot give or grant these Goods or Chattells to another, untill I have devested the property of them againe in me, by seisure, *&c.* 2 *Ed.* 4 *f* 15. 10 *H* 7 27.

where a right, or thing in action once suspended, shall be at another time revived where not.

The things in Action sometimes are extinct, and gone by the act of the party that hath right to them, and sometimes they are only suspended and shall be againe Revived: as if the ordinary commit the Administration of the goods of the Debttee to the Debtor, the debt is only suspended, and therefore if the Administration be unduly granted, and after revoked, and granted to another, the second Administrator may recover this debt of the first: And if there be not Assetts besides, this should be accounted Assetts in the hands of the first Administrator whiles it doth continue: So if a Feme sole Executrix of a Debttee, take the Debtor to Husband; this doth only suspend the debt; and if he dye, the Wife may sue the Executors or Administrators of her Husband, as shee might before; And that debt also shall still be reputed Assetts in her hands: So if the Debtor make the Debttee: or the Debttee the Debtor his Executor; and he do legally refuse:

or if he make him and others Executors, and they all refuse, then the debt is revived againe. *Co.*3.136.*Plow.*185. *Co.*8. 136.9.37.

But if a Feme sole Debtee take her Debtor to Husband: or if there be two Obligors in an Obligation, and the Obligee take one of them to Husband: Or if one be bound to a Feme sole, and another in an Obligation; and she take the Obligor to Husband; or if the Debtor make the Debetee his Executor: or the Debttee and another his Executors, and they do take the Executorship upon them: or if the Debttee make the Debtor his Executor, or him and another his Executors; and the Debtor dye before he take upon him the Executorship; In all these cases the debt or action, is extinct and shall not revive. *See Suspension. Co.*8.136.21. *Ed.*4.3. *Plow.*184. 11 *H.*7.4.21.*H.*7.24.

If a man disseise me of Land, and then I make him Lease for yeares of the Land: or if I make him a Feoffment in Fee on condition; and before the Condition performed make a Lease of all or part of it to another; by this the right or title is suspended. And if I make a Feoffment in Fee in these cases the Right or title is extinct and will never revive; So if the disseisee levy a Fine of the Land to a stranger, the right is extinct, and the Disseisor shall hold the Land for ever. *Co.*4.52. *Co* 2.56.*a.*

When a man doth dye all these things called Choses in Action, shall go to his Executors as part of his Chattells. *See in Chattell) chap.* *What persons shall have things in action*

If an Obligation be made to two men, and one of them forfeit by outlawry or otherwise, or had granted all to the King, in this case the King would have had the whole and the other had lost his part. 19 *H.*6.7.22 *H.*7.37.

If a villain disclaim, the Lord shall have no Choses in Action that were his. And if the King had had an Idiot, he should not have had any Choses in Action that were his hereby. And yet, if a man had been outlawed, the King should have had thereby the forfeiture, of all debts upon Especialties, but not of debts upon simple contracts. 7 *H.*7.24. 30 *Assiz.* p. 1.

It

Common. It is by some defined to be, The Right that a man hath to take of that which is anothers. And by others: That soile, water, or other thing, the use whereof is common to this or that Lordship, Town, or person. And it is therefore called Common, because it is common to two (*i*) the owner of the soile and one more at the least. *Termes of the Law. Coo. super Litt.* 122. *a.*

Quotuplex. And this is either of Pasture (*i*) for feeding for Cattell, which is a power and intereſt to feed a mans Cattell in the ground of another, or to use the ground that is not his own. As of *Turbary*, which is a power and intereſt to digg and take Turfes in the soyle of another man: Or of Fishing, which is, a power and intereſt to fish at certaine times in the water of another man: Or of Estovers, which is a power and intereſt, to have and take a certaine allowance of wood in another mans Wood: There is also a Common of digging of Coles, Mineralls and the like. *Coo. Idem.*

Appendent. The Common of Pasture is either *Appendant*, which is where a man hath Common for his commonable beasts, as Oxen, Horses, Kine, and Sheep only, in the ground of another by reason of certaine Land, that hath been anciently arable land unto which the Common is so annexed, that it cannot be severed from the same by any means, but he that hath the one must have the other. And this began when Lords did enfeoff their Tenants of arable Land, to hold in Socage (*a*) *Per servitium Soce*, in which case it was included in their Feoffment, that for the maintenance of their Plow, which by their tenure they must keep and for the furtherance of tillage (much favoured in the Law) such a tenant must have Common in the Lords wasts for such beasts as did manure and compast the Land which otherwise he could not have, for then most of the Meadow and pasture lay in great wasts and in Common: Or

Appurtenant. *Appurtenant* which is where a man hath Common for all manner of beasts, as well Commonable as others, as Swine, Goats, and Geese, and such like in the ground of another man. Or in *Grosse*, which is, where one claimeth to have Common for all manner of beasts, or for some kind of beasts

In Grosse.

by

by speciall grant in writing, and not by reason of any Land. Or by reason of Neighbour-hood or cause of *Vicinage*, which is, where the Tenants of two Lords that be seised of two Villages or Towns, lying adjoyning one to the other, and either of them have been used time out of mind to enter common one with the other with all manner of commonable beasts. And the three first of these kinds of Common of Pasture, are either Certaine (*i*) for a certaine number of beasts; or Incertaine by consequent, as when it is for such as be Levant and Couchant upon the Land: or else more Incertaine, when it is without number and in grosse. Also they are either Absolute (*i*) at all times and without exception: or Conditionall (*i*) if the Land be not sowed, or upon such like condition. And there are no other kinds of Common of Pasture besides these, neither may any man make or claim any title to any such Common, but as a Common of one of these kinds. And therefore a Title or claime of a Common *Ratione Commorantiæ*, or *Residentiæ*, in a dwelling house or the like is not good. *Termes of the Law: Coo. idem Co. 4. 37. N. B. 67. Broo. Common 13. F.N.B. 179. Stat. Merton cap 4. Co. 8. 70.*

Because of Vicinage.

Whosoever will claim or make to himselfe a good Title to any Common of Pasture must see that he have. 1 Some estate or interest in the Land, or thing, to which he doth pretend the Common doth belong for if one be disseised of his Common, and after make a Feoffment of the Land, to which it is incident, he is remediless for the common. (2) If he claime it by Prescription, that he have had it time out of mind, for an occupation of Common by usurpation, doth not give any title to him that doth occupie it, unless he have been seised of it time out of mind. (3) That he have had Seison of the Common, for untill then it seems he hath no remedy for it. And hence it is (as it seemes) That if one make me a Feoffment of a Plow Land, whereunto there is Common belonging, and I never take nor use the Common, and after make a Feoffment of this Plow land to another, that this last Feoffee hath no remedy for this Common, because I was never seised of it, therefore I could not grant it. (4) That he have an Estate in possession, as well as in Right of the Land, to which the

How a Title or claime may be made to have Common of pasture, and who shall have it, & not. And what shall be said common.

the Common doth belong. And hence it is, if a man be seised of Land, whereunto common is appendant, and is disseised, the disseisee cannot have or use the common untill he entreth into the Land, whereunto it is appendant: (5) That he claime it in one of these four kinds of common before mentioned, for if he make his title to it in any other manner, as *Ratione Commorantiæ*, or *Residentiæ* in a dwelling house, or the like; this will not be good, (6) But copi-holders in Fee, or for life may by custome claime and have common in the wasts of their Lord. (7) So also Inhabitants of a Village which is a Corporation may alleadge a custom to have common in such a place as belonging to their ancient Messuages, or houses, but otherwise not: (8) And therefore a custome alleaged, that every Baker, Butcher, or Shoomaker, dwelling in any ancient house in such a Parish or Village, shall have common in such a place for their horses, during the time of their residency there, is not good. And he that hath a good title to common, and doth make a claime to it, must take heed in what manner he doth it. (1) *Coo.* 6. 60. *a. F. N. B.* 160. *F.* (2) *Fitz. Common* 22: (3) *Fitz. Common* 24 (4) 19. *H.* 6. 33. (5) *Coo.* 6. 60. *a.* (6) *Coo.* 6 60. (7) *Fitz. prescription* 46. *Broo. Prescription* 28: 76. *Coo.* 6. 59: 60: *Broo. Common* 8. (8) *Hill.* 6. *Jac. Bant. Regis.*

Prescription.

Custome.

It seems an ancient Cottager may make him Title by prescription to Common, but a Cottager of a Cottage newly erected cannot prescribe, and therefore he cannot make himselfe a title to Common as belonging thereunto. *Kitch.* 5. 135.

Whosoever hath title to common appendant, hath it by prescription of usage, time out of mind, for a man cannot have it by grant, unlesse it be by the grant of the thing to which it is incident; but a man may make his title to this without Prescription, to say, He hath two Acres of Land, to which he hath Common appendant in such a Close or wast, *&c.* (a) And this Common a man may claime or have as belonging to his Mannor, Farme, or Plow land, but it shall be intended to belong only to the demesnes of the Mannor presumed to be ancient arable, and the arable Land of the Farme, and the Plow land; And therefore in the case of the Mannor, the Lord

Appendant.

Lord shall have Common, only according to the proportion of the Demesnes, and if a tenancy escheat his Common shall not increase: *Coo.* 4.37. *Fitz. Common.* 1. *Brov. Prescription* 30 (*a*) *Coo.* 4.37. *F. N. B.* 180 *N. Coo. super Litt.* 122.

And if there be now built upon that which was anciently arable Land, to which the Common is appendant, a house, and part of it be turned into Meadow, and part into Pasture, yet it is still and may be claimed as common appendant, and he shall have Common for all the cattel he keeps on that ground, which was anciently arable Land, but otherwise common appendant cannot be claimed as belonging to a house. (*b*) And yet it is said the common of the Inhabitants of ancient Villages that they claime as belonging to their ancient houses is in the nature of common Appendant. (*b*) *Brov. Common* 8. *Note*

Gatewards in 6 rep. 59. & 60 is against such a kind of common, though it be by Custome.

This common may be claimed either for a certaine number of Cattel, or for an incertain (*i*) all the cattell levant and couchant upon the ground, to which it is incident. And it may be absolute (*i*) to have common in the Land at all times, and without exception whether it be sowed or not. (*b*) Or it may be with condition (*i*) if it be not sowed, or the like. And therefore it is, that a man may prescribe to have common for his cattel in a peece of ground from Michaelmas to Candlemas, if it be not sowen, and if it be, then from Michaelmas untill it be sowen againe: or to have it so long as the Commoner shall dwell upon the house and Land to which it is appendant: or to have it so, as he pay twenty shillings a year to the owner of the Soyle, and otherwise not. These and such like Prescriptions are good. And if the Prescription be for commonable beasts only, then it is common appendant, but if it be for all manner of beasts, then it is common Appurtenant. *Coo. super Litt.* 122. *a* (*b*) *Brov. Common* 25 13. *Fitz. Common* 7. *F. N. B.* 118. *E.*

A man may make him a title of common by Prescription in *F.* as belonging to his tenement in *S.* in this manner, *viz.* in 100 Acres of Land, a 100 acres of Meadow, 200 Acres of wood, and one hundred Acres of Moore & Pasture (*i*) in the third part of the Land all the yeare, and in two parts of the Land from the time the Corne is cut till it be sowed again, and in the Mea-

dow from the time the Hay is out, untill our Lady day, and in the Wood, Moore, and Pasture, at all times of the yeare, with all manner of beasts, and this is good. But one may not in any case make himselfe a Title to have Common in Land, whiles there is Corne upon it. *Kitch. fol.* 135.

A man may make himselfe a Tytle to have and enjoy, *Solam vesturam terræ* for a time, (*i*) from such a day to such a day, and so long to exclude the owner of the soile himselfe to feed there: But a custome or prescription to exclude the owner alwayes is against Law, and not good. *Co. super Litt.* 122. *a. b.*

If a man say, he and his Ancestors time out of mind, have had Common in certain Land for their beasts Commonable, Levant and Couchant in such Lands, this is common appendant to that Land. But if he say that he hath had common for all manner of Beasts, or for his own Beasts Levant and couchant, and others coming or being on the Land: this is common appurtenant, and not appendant. *Brov. Common* 23.

If in a village where their Lands lye intermixt in their Fields one hath inclosed his Land, and the rest of them that have had Land there, have been used to take their Common in his inclosed peece after Harvest untill Seed time againe; This if it be for commonable beasts only is common appendant, if for all manner of beasts it is common appurtenant. And this kind of promiscuous feeding where Lands lye in little parcells is called in *Norfolk* Shak. And it is a kind of common appendant. *Co.* 7: 5.

(i) *Appurtenant.* A man may make his title to this kind of common by Prescription, or by grant, for one may have it by either. *Co.* 4. 38.

If a man prescribe to have common for all manner of beasts as belonging to his Land: Or prescribe to have common for commonable beasts only, but as belonging to Land, Meadow, and Pasture: or prescribe to have common, not only for his own beasts, Levant and Couchant, but for others also, that shall be upon the Land to which it doth belong: or in any other

ther manner wherein it appeares that the common claimed would be contrary to the nature of common appendant, and yet he claimeth it by Prescription, this must of necessity be common appurtenant. *Cok.* 4.37.38. *Brow. Common*, 13.

This kind of common claimed by Grant or by Prescription. As where I grant to another, he shall have common in my ground or Land: or this being taken time out of mind by vertue of this grant, may afterwards be claimed by Prescription. *Cok.* 4.38.*a.b.* 3 *In gros.*

This kind of common must alwayes be claimed by Prescription of time out of minde, *&c.* and cannot be claimed by Grant. *Cok.* 4.38.*a.* *Because of Vicinage or Neighbourhood.*

No Lord may claime this kind of common for him and his Tennants, but he that is seised of the Village in possession: but it seems one Neighbour may claime this kind of common in the Land of his Neighbour in the same village, although neither of them be lord of the village. *Fitz. Common* 5. *F.N.B.* 180. *D.*

If two villages be adjoyning and a great Field or waste between them, part of which doth belong to one village, and part to the other, and the Tenants of the one village, have common with the tenants of the other, this is a common because of Neighbourhood, and not any other common. But if there be two Villages and a third between them, and one Village hath common with the Village that is furthest of it: or the one Village hath common with that which is next it the one season of the year, and the other hath common with it another season, or every second yeare, neither of these are commons because of Neighbourhood, but common appendant or some other kind of common. *Dyer* 47.*p.*12.

If a Lord be seised of two hundred acres of a common Moor and enfeoff another of fifty acres of it at the North side thereof, in this case the Purchaser, and the Lord have not common because of Neighbourhood, nor any other common one with another: and therefore they must keep their cattell one from anothers part, or else they may distrain each other. *Dyer* 372.*p.*10.

A purtenant. The nature of all Common is, that it may be Extinguished or suspended. For which see *Extinguishment. Co.6.60.*

The nature of this kind of Common is, That it is of common right, and began by operation of Law, and in favour of tillage, and cannot be created *de Novo* at this day, And it is ever belonging to some Land, or to some thing in grosse, wherein arable Land is included, and it belongs to such land as is, or anciently was arable Land, it is taken and claimed only with commonable beasts, and a reasonable proportion only, and such as live upon the Land to which it doth belong, and it cannot be severed from the Land to which it doth belong. But Common appurtenant, howsoever (as it seems) it be ever belonging to some Land, or such like thing, yet it is not of common right, and therefore this doth much differ from that which is appendant.

1. That which is appendant cannot be created, but must grow by continuance of time, and by Prescription of time out of mind must be claimed, but the Common Appurtenant may be newly created and granted at this day.

2. This must be taken and claimed only, by such beasts as manure or marle the Land, as Oxen, Horses, Kine, Sheep, *&c.* but that may be claimed for all manner of beasts besides these, as Goats, Hoggs, *&c.*

3. This is to be claimed for, and taken with so may beasts only as will serve to manure and marle the ground having respect to that proportion, as if it be appendant to one acre, then he shall have common for so much as that acre will keep, except it be for a number certaine. But that may be claimed for, and taken with more.

4. This is to be claimed for and taken with the beasts only, whiles they be Demurrant, Levant, and Couchant, upon the Land to which it is appendant; But that may be claimed for, and taken with the beasts that go and are kept in any other place.

5. This is to be claimed by reason of ancient arable Land only called Hide and Same, and not to Land newly approved from the Wast, Meadow, or Pasture; But that may be claimed for

for or by reason of a house or any other land as Meadow or Pasture, or arable land newly made.

6 This cannot be severed from the Land to which it is appendant, and granted away, and made in grosse, by any act of God, the Law, or parties, but that may be severed by either.

7 If a man purchase part of the Land wherein he hath this Common, the Common shall be apportioned; but if hee that hath Common appurtenant, purchase part of the Land out of which it comes, it shall not be apportioned, but is gone for ever. See *Apportionment*: And see more, *Infra. Co.* 6. 60. 26 *H.* 8. 4. *Broo. Common. Fitz. Common*, 11. (2) 9 *Ed.* 4. 3. 37 *H.* 6. 34. (4) 15 *Ed.* 4. 32. (5) *Broo. Common*, 15. *Fitz. Common*, 7. (6) *Perk. Sect.* 104 *Kelw.* 136. *Broo. Common* 29. 5 *H.* 7. 7. (7) *Co.* 4. 37.

3 *In grosse.*

The nature of this kind of Common is, That it is not appertaining to any Land, and may be created at this day, and may be taken with any kind and number of Beasts, as the Grant or Prescription is, and this is grantable over. But for the grants of Common, see *Grant. Co. super Litt.* 122.

4 *Because of neighbourhood.*

This Common is much of the nature of Common appendant, and cannot be created at this day, and is rather belonging to the whole Village then to one man, or to any one mans land in particular, and this it not to be severed or granted in grosse. *Broo. Common* 30.

5 *The power of a commoner, & what he may do and justice.*

The Commoner may and must in all cases take and use his Common, acording to his title, whether it be by Grant or Prescription: As if his title be to have Common for his owne Beasts, he cannot take it by the Beasts of strangers; but if his title be for Common for Cattell without number, or for so many Beasts indefinitely, in this case (unlesse it be in the case of common appendant) he may take it by the Beasts of strangers: And in all these things custome is much regarded, *Consuetudo loci est observanda. Fitz. Common* 3. *F. N. B.* 80. *b.*

In the taking and using of his Common: And how he shall take it.

All Common must be used and taken by the feeding of the Cattell, and with the mouths of the Beasts, for the Commoner,

ner may not cut and carry away the grasse and feed his cattel elsewhere: *Vide infra.* 12 H. 8. 2.

How it shall be taken by Co-heyrs. *See Coo. super Lit.* 165. *a. & Partition.*

1 *Appendant.* Common appendant must be used and taken with the Commoners own proper cattell (*i*) such wherein he hath an absolute property, or such wherein he hath a special property (*k*) that he hath hired, or doth allow to go there of purpose 2 *Appurtenant.* to manure or compast the Land; and he may not put any cattell upon it but such as are commonable, neither may he take in or agist any cattell but commonable cattell, and to that purpose also: And therefore if he take in such cattell for that purpose, and do not so employ them, he may not take his common with them: So also where the Commoner makes his title by Grant or Prescription to have common for his owne proper Beasts, he cannot take it with the Beasts of others. As if one grant me common for mine own Beasts without number, or for twenty of mine own Beasts, I cannot take it with the Beasts of others: But if a man have Common appurtenant granted to him, or in grosse for cattell in generall and indefinitely: in these cases the Commoner may take it with other cattell then his own, and may agist and take in cattell upon it. *Brov Common* 41. 14. 5. 48. *Fitz. Common* 3. *Fitz. N. B.* 180. *b.* 22. *Ass.* 82. *Keich.* 136. *b.* 137. *a.*

He that hath common appendant must take it with such Cattell as are commonable only, and for so many only as he doth keep, and are levant and couchant upon the land to which it is appendant and no more: And therefore if one have two Tenements in two Villages, and Common appendant to one, he cannot take his Common with his Beasts that are levant and couchant upon his other Tenement. *Fitz. Common* 16.

A Termor of Land to which Common is appendant, may not put in any cattell upon the common he hath to sell, but only such as he doth keep to manure or compast the Land, or for his own houshold. *Brov. Common* 14. 14 *H.* 6. 6.

If

If one grant me a Messuage, and Common appurtenant for tenne Beasts, I can have no more but common for tenne Beasts.

If I have common by grant, I must take it according to the grant. As if he grant me common *ubicunque*, the Beasts of the Grantor shall goe, and he do occupy an hundred acres with his Beasts, in this case I may take common there at all times: But if the grant be, *Quandocunque* the Beasts of the Grantor shall go there, in this case I cannot common there but at such times as the Beasts of the Grantor go there, and such grants shall have a reasonable construction. And therefore if I grant a man common out of all my Manner, he may not by vertue hereof have common for any Beasts but such as commonable, nor have common in my Gardens or any such place, but only in commonable places: And if I grant one common for ten Beasts yearly for three years, and he do not take his common the first two years, now he shall not put on thirty; and take all the third yeare: And so if I grant a man common for all manner of Beasts without number, he may not take this with so many Beasts as to leave me no pasture for my cattell. *See more of this in Grants. 9 H. 6. 35. Fitz. Common 6. 12 H. 8. 2.*

3 In grosse.

Grant.

This kind of commoner may not put on the common what he list, but according to the proportion of the Land to which it is appendant, and the quantity of Land belonging to the Village whereof the commoner is: And in this case the commoners of the one Village, cannot put in their cattell into the common belonging to the other side, for so the commoners of that Village may distrain them damage-fesant, or the Lord may bring an action of Trespasse aganst the owner, but they must put them in on their own side of the Field, or wast, and then may they stray and feed in the other part, and justifie it. *Coo. 7 5. Coo. 4 39. 13 H 7. 13.*

4 Because of neighbourhood.

Whatsoever horses may be fed and kept upon commons. *See stat. 32 H. 8. cap. 13. & Eliz. cap. 8.*

Where-

2 *In the relief of himself when he is disturbed in his Common, and what relief he shall have.*

Whatsoever the Law gives a man a good title to any Common of Pasture, it gives him also means to come by it, and recover it, if it be denyed him after he is once seised of it. *Co.* 6. 60.

If the Commoner have any estate of Free-hold in the Common, and the Lord, or any other do by Inclosure, feeding, or otherwise, hinder or deprive the Commoner of the fruit of his Common, so that either he cannot take and have it at all, or not so largely and beneficially as formerly he hath had it, in this case he may have an Assise: And if the Commoner have only an Estate at will by copie, or a lease for years, or such like estate, in this case, albeit he may not have an assise, yet he may have an Action of the Case, and thereby relieve himself. (*a*) As if a man digg and carry away the soile to the hurt of the Commoners, each of them may have this Action. And in both cases if the wrong be by feeding of a stranger, and not the Lord, the Commoner may take his Beasts damage fesant, and impound them: But if the wrong or trespasse be so little, that the Commoner hath not any losse at all by it, but that the Commoner hath his Common sufficiently, and in ample manner, in this case, howsoever the Lord, or owner of the soile may have an action of Trespasse for this be it greater or lesse, yet the Commoner can neither bring any action, nor distrain the Cattell damage fesant. *Westm.* 2. *cap.* 25. *Co.* 9. 111. *Co.* 4. 38. (*a*) *Adjudg. B. R. Trin.* 21 *Jac.*

Action of the Case.

If the Lord inclose where he ought not, or more then he ought where he may inclose, the Commoner may have an Assise against him, *vide infra. F. N. B.* 125. *Fitz. Common.* 9.

A Commoner may enter into, and upon the Common to see to his own Cattell, and likewise to see if there be any strangers cattell thereupon damage fesant; and if he be not disposed to impound such cattell if he find them there, he may drive them out gently as he may the cattell in his owne severall soile. *Co.* 9. 111.

If the Lord or owner of the soile put Conies *de novo* upon the

the Common, or increaſe them and their Burrows for them where there were ſome before, ſo as the commoner cannot take his common as heretofore; In this caſe whether it be a Warren or not, albeit the commoner may not kill, nor chaſe the Conies, nor ſtop the Burrows, or if he do, the Lord may have an Action of Treſpaſſe againſt him; yet he may have an action of the *Caſe* againſt the Lord, and recover his damages. *M.* 5. *Jac.* Sir *Chriſtopher Hodſons caſe*, *M.* 9 *Jac. Samburns caſe.* *Treſpaſſe.*

If the Lord or any other, ſet up any houſes, or other buildings, or digg any ditches, or the like in the Common, unleſs it be ſuch as be juſtifiable by ſome Law (for which ſee *infra*) the commoner may proſtrate the building, fill the ditches, *&c.* Yet ſee *Fitz. Common* 26. Sir *Chriſtopher Hodſons caſe*, 7 *H* 8. *Brac. Common.*

If the Lords pigs goe upon the common where is no common for pigs, and there do much harm, it ſeems the commoner may have his Action againſt him, as in the caſes before. *Brac. Common.*

If I have common in another mans ground, and he make a hedg upon his ground to keep me from my common, unleſſe it be in the caſe of Improvement, I may throw down all the hedg: And if the hedg be made on another ground, and not the ſame wherein my common is, I may break down as much as is needfull to make my way to my common, and juſtifie it, though it be upon another mans ground. 15 *H.* 7. 10. *Fitz. Common* 36.

If trees be cut downe upon a common, and lye upon the Graſſe, the Commoner may remove them into ſome by-place out of the way in the ſame ground, and juſtifie it, but he may not remove them into another mans ground, for if he do, he will be a Treſpaſſor. *Hill.* 9 *Jac. Dean de Wincheſters caſe.*

A Commoner may not have a *Curia claudenda* againſt a man that ought to repayr his hedg next to the common, although by default thereof the cattell come into the common. *F. N. B.* 128. *c.*

It is said that the Commoner may not have a generall Action of Trespasse for any wrong whatsoever done to the common, but some other remedy before set forth: (a) And yet it seems if one that hath common because of neighbourhood put his cattell upon that part of the common that doth belong to the other Village, that the commoners of that Village may have an Action of Trespas against him that doth it. *Bro. Common* 24. 40. (a) 13 *Henry* 7. 13. *Bro. Common*, 55.

2 upon the land or soil but of which the Common is had, & what he may doe thereupon.

The Commoner though he may enter into the Common as before, to see his catell, &c. yet he may not when he is there cut down any trees, digg or take away the soile, or cut the grasse and carry away the same to give his cattell elsewhere, or otherwise misdemean himself; for if he do, he shall be said to be a Trespassor *ab initio*, for the Commoner hath no interest into the soile at all: And therefore it is held that if he dig Trenches in the common (though it be to let out the water, and better the common) he is a Trespassor to the Lord, and he may have an action of Trespasse against him. Sir *Christopher Hodsons case*, 12 *H.* 8. 2. 22 *Ass.* p. 36.

Trespasse.

The power of a Commoner to grant his Common, what Common is grantable, and how. *See in Grant.*

6 The power of the Lord, or owner of the Soile, & what he may doe and justifie.

The interest of the soile wherein the commoner hath his common is in the Lord only: And therefore it is, that for every little trespas done to the grasse or soile, he may have an Action of Trespas, and he may take the Beasts of any stranger damage fesant upon the common, albeit the Trespas be never so small: And for this cause the Lord may digg turfes, or gravell in the soile, cut down trees, or do any thing else as owner of the soil, so as he do not prejudice the Tenants or Commoners in their common, for then they have remedy against him as before. *See intra in Admeasurement. Co.* 9. 111. 4 38.

The Lord also may inclose and improve a part of the common and seclude the commoners for ever, either to preserve and nourish young wood (for which see *Wood*) or otherwise to make severall (of which see *infra*) in some cases. *Stat.* 35. *H.* 8. 17. 3 & 4. *Ed* 6. *cap.* 3.

Inclosure

Inclosure is the shutting in of that which lay open before. And if it be where a man hath common in the Lords waste ground, and the Lord incloseth part of the waste for himself, leaving nevertheless sufficient common with egresse and regresse for the commoners, it is called an Approvement or Improvement. *Terms of the Law.* *Inclosure. Improvement.*

The Lords of Wastes, Woods, and Pastures [wherein divers men have common appendant] may appear against their Tenants and neighbours, and without their good will and consent, if they leave sufficient common and pasture [at the time of the inclosure] to the Commoners according to their Land, with egresse and regresse. And if the common be in three Villages, the Lord may approve in the one Village, leaving sufficient in the other two Villages. But if the Common be appurtenant, or in grosse (which may be by grant). As if the Lord grant common to one for all manner of Beasts in all his Mannor or Wasts, in this case there can be no improvement, unlesse it be so that the Lord in his grant hath excepted a parcell of the Mannor or Waste out of the ground to make an Inclosure, and in that case the Tenant is to have no common in that parcell. For the Statute is, (a) That if any do claym common by speciall Feoffment or grant for a certain number of Beasts which he ought to have of common right, he shall recover according to the form of the grant made to him. *Stat. Marlon. cap. 4. Brev. Commen 20. 21 Stat. 13 Ed. 1. cap. 46. Brev. Commen 26.* (a) *Stat. 13 Edw. 1. cap. 46.* *7 Where the Lord may inclose or approve against his Tenants, and how: and where not.*

Also the Lord or owner of the soile may inclose a certaine reasonable portion of ground out of the common for the building up of a Windmill, Sheep coat, Dayrie, enlarging of a Court, Courtilage, or the like [as for the enlarging of his own dwelling house, or parlet, and when there is a necessity that it is not large enough for his state and use: or for the making of a house to lodge a man to look to the soil or any such like use.] *Stat. 3. Edw. cap. 46. Fitz. Commen 14. Brev. Commen 23.*

And if any Lord shall make any such Improvement according to these Statutes, and set up any hedg, or ditch, and it be pulled down by night, or at such times that the persons that do it, cannot be known, and the Juries there will not find the offenders, in this case the Towns neer adjoyning shall be distrayned to make it up at their own costs, and to yeild damage. *Stat.* 13. *Ed.* 1. *cap.* 46.

All such houses and inclosures to and with the same not above three acres: or Gardens, Orchards, or Ponds, not above two acres taken out of any Common before 5 *Ed.* 6. is not to be expounded any breach of these Statutes: And if the inclosure be above three acres, the overplus is to be laid open, and the rest to continue. *Stat.* 3. & 4. *Ed.* 6. *cap.* 3.

Certain wasts and marish grounds in some Countries allowed to be drained and approved by consent of Lords, owners, and undertakers; for which see the statutes of 43 *Eliz. cap.* 11. 4 *Jac.* 8. 13.

Chimin. A way is a passage for men to travaile in: And there be three kinds of wayes.

Quotuplex. 1 A foot-way, which is called *Iter, quod est jus eundi vel ambulandi hominis*, and this was the first way.

2 A foot and horse-way, which is called *Actus, ab agendo*, and this is commonly called a Pack and a prime way, because it is both a foot-way, which was the first and prime way, and a Pack and drift way also, *via* or *Callis*, which doth containe the other two, and also a Cart-way, for this is *jus eundi, vehendi, & vehiculum, & jumentum ducendi*, and this *Chiminage.* is it which in the Law-books is called *Chimin*. And from hence doth come the word *Chiminage*, which doth signifie a Toll due by custome for the having of a way through a Forrest (the which is sometimes in ancient Records called *pedagium*) And this way also is two fold.

1 *Publique*, the which is called *via regia*, the Kings High-way, or the Royall way, which is the way that leadeth from one Village to another, and to Market Townes, and

and this is a way for all men, and wherin every man ought to pass to and fro without let, which is called the Kings high-way, because the King hath at all times passage in it for himself and all his people, and he may punish all the Nusances and abuses done in it.

2. Private, and then it is either *vicinalis* (i) that which doth belong to a Village or Town, or that which is in, or leadeth to, or from a Village, or doth serve for a Village to lead to the high-way, Church, Market, Field, or the like, and this way is called *communis strata*. 2. *Particularis*, which is such a way as one or more hath by grant, or Prescription through another mans ground, either from one Close to another, or from his house into the field, high-way, or the like: And this way is somtimes appendant (i) adjoyning to some other thing as house or land, and appertaining therunto; as if a man hire a Close, or Pasture, & hath a Covenant for Ingress & Egress, to and from the said Close through the ground of some other man, through which otherwise he might not pass: Or it may be that which is called Reall, which is when a man purchaseth a way through the ground of another man, for such as do, or shall dwell in such a house, or for such as shall be owners of such a Mannor for ever; Or it is in grosse. (i) Such a way as a man doth hold principally and solely by it self; As where one doth covenant for a way through the ground of another man for himself and his Heirs. So that there are high-wayes, common wayes, and private wayes. *Terms of the Law, Co. super Litt. 56. Kytch. fol. 137. 35. Broo. Chimin. in toto Statham. Chimin 1.20 Ass: 28.39 H.6.6.*

As touching the Kings High-way, these things are to be known.

3. The nature of waies. And the interest of the King and Subject in the high-waies.

1. That the King hath not, nor claimeth more therin but the free passage of him and his Subjects as an Easement, the which if any man do deny or interrupt them in, he may be punished for it.

2. That

2. That the Subject hath not nor claimeth more therin of right but a liberty and freedom for his travail and passage, the which he may justifie by Prescription, and no man can deny it to him.

3. The Subject can make no other use of it but for his travail, and therfore he may not build houses, or lay his Soil or Blocks upon it, but he will be punishable for it; Nor will a Prescription in this case enable him so to do: *Prescription.*

4. The Soil and the Free-hold of the same and all the profits therof, as Trees, Grass, and the like, do belong to the Lord or Owner of the Soil or Mannor, and not to the King or his Subjects in generall, nor to him whose ground is next adjoyning: And therfore the Lord or Owner of the Soil may lay the Hills there, or do any thing for the bettering of the High-way; or he may take the Profits, the Trees, Mines, and the like, so as he do not prejudice the way therby; for this he may not do, albeit he pretend a Prescription for it. And the Franchise of the High-way doth belong to the Lord of the Soil, and he shall have a Purpresture; And hence it is, that by the common Law the Lord or Owner of the Soil is bound to cut down the Trees and Bushes therin that do offend. And hence it was, that if one had given a Mannor rendring Rent, and within this Mannor there had been a great street, that the Donor might have distrained for his Rent in this street, for it was reputed within the Fee, untill the statute of *Marlbridge* came, which did forbid the taking of a Distress in the High-way; And yet in cases where the High-way doth go through a mans severall ground, the Owner of the ground, and not the Lord of the Mannor shall have the Trees, and Profits of the High-way. (†) And any man (as it seems) by Prescription may have common of Pasture and feeding for his Cattell in the High-way, albeit the Soil belong to another.

5. The

5. The King and Subject hath such a right to this Easement, that they cannot by any Act they can do, suspend or extinguish it.

6. As touching the private waies to common fields, and the like, it is held that the Free-hold of them and all the Profits therof do belong to him that hath the ground next adjoyning, and therfore that he may cut the Trees and take the Profits thereof.

7. As touching the particular way, this with all the profit therof doth belong to the Owner of the Soil, but he that hath the way hath interest into the same according to his Title by Prescription or Grant; but this is such an interest as may by acts done by him that hath this Title, be suspended or extinguished. *Fitz. & Bro. Chimin in two.* 13 *H.*8.10. *Bro. Leet.* 3. 8 *Ed.*4.9. 27 *H.*6.9 2 *Ed.*4.9. *Dalt. Just. of p.* 60. 32 *Ed.* 3. *Barre* 261. *Statham Chimin* 2 *Fitz. Rescous* 14. (†) *Inter Cantrell & Church. Hill.*42 *Eliz. Rot.*473. *Bro. Nusance* 28. 8 *H.*7.5.

4. *Where a Way may be by Prescription: And how and in what form, and by what persons the Prescription ought to be made and alledged.*

Every man by the common Law may prescribe to pass and repass in the Kings High-way; And by Prescription men may have a private way; and therfore the Inhabitants of a Village, being but Tenants at will may prescribe to have a way to Church, or to Market, or into their Fields; And if they say, that the custom and usage of the Village of *D.* hath been time out of mind, that the Inhabitants of the same Village have had a way over such a ground or close. Also one, or some few men may prescribe to have a way to his field, or close through another mans close. And in these cases it is held men may prescribe to have a way through a Church, or Church-yard, and therfore much more through a common house, or through an Orchard or Garden. But in all these cases when a man is to make or set out his Title by his Prescription, he must take care how he doth prescribe; *viz.* By what.

what persons, and in whose names to make the Prescription, and to set forth the particulars, what way he doth claim, and which way it is to go: As if a man claim a way from his house, to such a Close called *B.* he must set forth what way, whether horse or foot-way he claimeth, and by and through what places his way is to go, or otherwise his pleading will be faulty. *Dyer* 71.18. *Ed.*4.3. *Broo. Prescription* 76: *Cro.* 6. 60. 18 *Ed.*4.8. *Broo. Prescription* 91. *Broo. Prescription* 76.

5. What shall bee said a Disturbance. And the remedy for a wrong or Disturbance in a publick or private way.

To erect a House or Wall upon the high-way, to set up a House of Office, to lay Soil, or Carrion in or upon the high-way, if it be an annoyance to the Traveller, to dig a Ditch athwart the way, or any way to straiten and lessen the way, not to scoure the Ditches, but to suffer them to fill, that the water doth overflow into the way, or otherwise not to repair but to suffer the way to be decayed, all these and such like things in case of the Kings high-way are disturbances and wrongs to the King and his Subjects: For the punishment and redress wherof, no one man in particular may have an Action of the case, for then every man might have an Action: But this is to be punished and redressed most properly at a Leet, or at the Sheriffs Turn by Presentment, or at the Sessions by Indictment; in which case any Subject that will may be a Prosecutor in the Kings name: Or if the common Nusance in this case be in erecting, any man may prostrate the thing erected. If the fault be in not repairing, the party that ought to repair must be punished, as if it be the Inhabitants of the Parish that should repair, and they do not, they must be punished; and if any man be bound by his Tenure, or otherwise to repair and do not, he is to be punished for it. And yet the Lord of the Soil may have a private Action against a man that shall dig in the Soil of the Kings high-way: Also if any man in particular shall meet with any speciall harm by the publick Nusance, as if a man lay a Tree, or dig a Pit in the high-way, and my horse stumble at it and hurt me, or himself therby, albeit there be a great deal of room besides in the high-way; In this case he may have a speciall Action of the case. (†) But

if

if the high-way lead through a Corn field, or such like place, and a man hath land on both sides, and he incloſe on both sides leaving the way broader then it was before; this straiting of the way in this case is not punishable. And yet in this case of a common field, if the high-way lying in it be ill for travelling, the Passengers may go into the land adjoyning, and if the next land be deep, into the next to that, and if the land be incloſed and the way deep, he may break the Incloſure and go on the other side. *Coo.* 9 113. 5 73. 27 *H.* 8. 27. 15 *H.* 8. 16 *Coo. ſuper Lit.* 56. 27. *Broo. Action ſur le caſe* 93. 5 *Ed.* 4. 2. 2 *Ed.* 4. 9. 8 *Ed* 4. 9. *Kytch.* 34, 35. 33 *H.* 6. 26. (t) *Agreed in Sr Edward Duncombes caſe, Trin.* 10 *Car. B. R.*

The ſame things for the moſt part that are diſturbances to a man in the Kings high-way, are diſturbances to men in other waies, but they are not to have the ſame remedy; For if the Inhabitants of a Village have a way to their Church, or otherwiſe, and they are diſturbed by any means that they cannot uſe their way as formerly they have done, in this caſe every man of them may have an Action of the Caſe againſt the diſturber, as every Commoner may have againſt a ſtranger that doth diſturb them in their Common, for otherwiſe they were without remedy, for they cannot puniſh this wrong in a Leet: And if any one, or more men have a private way to a Cloſe, *&c.* and another diſturb him in it, he is to have an Action of the caſe, or in ſome caſes an Aſſiſe of Nuſans: Or if his way be ſtopped, he may open it, or go beſides it. And therfore in an Action of Treſpaſs for breaking of ones Cloſe, the Defendant pleaded, that time out of mind he hath had a way through it, and that the Plaintiff being Owner of the land hath plowed it, and ſtopped the way with Thornes, whereby the Defendant being barred of his ancient way, went beſides it upon the land adjoyning to his way. And this was adjudged a good plea in *Horne & Winſlades caſe, Ad.* 6 *Jac. B. R.* But in theſe things ſome take differences, and ſay, where a man hath the free-hold of the thing wherto the way is appendant or appurtenant, there he muſt have an Aſſiſe, and where

not an Action of the case. And where the way is wholy stopped there the party grieved shall have an Assise, but where it is but strained only, there an Action of the case; And where the stopping is by the Ter-tenant an Assise lyeth, but when it is by a stranger an Action of the case lyeth: And where one doth not repair so that I cannot pass, there I must have an Action of the case, but where he doth erect or levy any Nusans in it, I must have an Assise. *F. N. B.* 183, 184. *Br. Nusance* 13. *Dyer* 250. *Cro.* 5. 73. 27 *H.* 8. 27. 14 *H.* 8. 31.

Amongst Copy-holders who can have no Assise nor Action of the Case for wrong done in their waies, it is usuall to enquire at their Courts, and to pain the parties that do wrong, and to assess the pain, for in this case they may do so, because they have no other remedy. *Kytch.* 35.

6. Amendment of ways and Bridges.

All men that have Ditches adjoyning to the high waies, are bound to cleanse them, though there be no Prescription against them for it. (But for the Ditches that do not adjoyn, those they are not bound to cleanse, unless there can be alledged some Prescription against them in it.) And it seems to me by the same reason, that those that have Trees whose boughs do over-hang and annoy the high-waies, are bound to lop them; yet the opinion of *Rastall* is contrary, in 8 *H.* 7. 5. But now by the Statutes they are bound to scoure their Ditches, and cut their Trees and Bushes, under pain of ten shillings for every default, 8 *H.* 7. 3.

The Constables and Church-wardens of every Parish with some of the Parishioners must upon *Easter* Tuesday or Wednesday, yearly appoint and choose Surveyors for that year, for amending the high-wayes; Those Surveyors are to see to the amendment of the waies, and for that end to require the aid and help of the Neighbour-hood, according to the Statutes, which see at large. 2. & 3. *Ph.* & *M. cap.* 8. 18 *Eliz. cap.* 9. 3 *Jac. cap.* 19.

If a man inclose the highway and make it his own ground, he must amend it himself, and the Parish need not to amend it. *Tr.* 10. *Car. R. Curia B. R. in Sir Edw. Duncombes case.* By

By the ancient common Lawes Villages are bound to repair their high-waies, and may be punished for their decay, and if any do break down, straiten, corrupt, or marre the high-waies, he is punishable in the Kings Bench, or before Justices of the Peace *Oyer* and *Terminer*, *Lect*, or the like, 27 *Ass.* 63. *Cromp. Jur.* 76.

So all Purpresures or Nusances made upon the Kings high-way by land or water, to the damage of the King and his people, is punishable there, *Idem.*

And he that hath land adjoyning to any high-way, by the common Law (before any *Statutes*) was and is chargeable of common right to cleanse and scoure the Ditches adjoyning to the high-way, *H.S.* 7.5 *Brow. Nusance* 28.

By an ancient Statute the high-waies from one Market Town to another ought to be enlarged, and all the Bushes and small Woods neer it to be cut down, that there be no lurking places for Theeves within two hundred foot of either side; And if by default of the same any Robbery were done, the Lord of the place ought to answer it; and if any Murther the Lord shall be fined. And so the waies within the Kings Forrests and demean Lands ought to be enlarged; And by the statute it is provided, That if a Park be taken from the high-way, the Lord shall set his Wall or Pale two hundred foot from the high-way, or that he make such a Wall, Dike, or Hedge that offenders may not pass to and fro to do evill, *Stat. of Winchester*, 13 *Ed.* 1. *cap.* 5.

If Bridges be decayed, and any one or more is bound by Prescription to repair them, he or they shall be compelled to it. And for this purpose it seems is the ancient Writ in the Register, called *Pontibus reparandis*, which is a Writ directed to the Sheriff, to will him to command one or more to repair a Bridg to whom it belongeth. And for this was the *Pontage*, which doth signifie either a contribution towards the maintenance

Pontibus reparandis Pontag. Quid.

or re-edefying of Bridges, or a Toll taken for his purpose, of all those those that pass over Bridges, *West.2 cap.2. 39 Eliz. chap.24. Cromp. Iurisd. fol.199. Regist. orig. fol.153.*

Four Justices whereof one of the *Quorum* may take order for amendment of Bridges in the high waies, and compell them to it, that ought to amend them: And if it be uncertain who ought to do it, they may set a rate upon the Neighbour-hood, and make them do it, and appoint Surveyors to see it done: But no man unless it be in this course shall be distrained to make any Bridges but such as have been used to do it, *Stat. 22 H.8.cap.5 9 H.3 cap.15.*

See who shall maintain *Eden* and *Prestback* Bridges, *Stat. 43. Eliz.2.cap.16. Newport* and *Carlion* Bridges, *Stat. 39. Eliz.cap.23. Wilton Bridge, 39 Eliz. cap. 24. Rochester Bridge* in *Kent, Stat.9 H.5.cap.12. 18 Eliz.16. 27 Eliz.25. Stamford* and *Culhamford* in *Oxfordshire, Stat. 8 H.6. 28. Chepstow* Bridge in the Counties of *Glocester* and *Munmoth, Stat. 18. Eliz.17. 3 Iac.23. Cardiff* Bridge in the County of *Glamorgan, Stat.23 Eliz. 11. Upton* upon *Seavern Bridge, 3 Iac.24. Staines* Bridge in the County of *Middlesex, Stat. 1 H. 8: cap. 9.* The Bridges over the River of *Lee, Stat. 13. Eliz. cap. 18.*

Vide Dissent. Discontinuance. Entry.

Claim. IT is a challenge by any man of an Interest or ownership of a thing, that is in the possession of another, or at least out of his own, and this is either actuall or by Deed, as by Action *(i)* when a man doth bring his Action for the thing he claimeth, or by Entry or Seisure *(i)* when one doth enter into or seise the thing he doth so claim; Or else it is verball *(i)* when one doth by words claim and challenge the thing that is so out of his possession. And this is somtimes to Lands and somtimes to Goods or Chattels. Also some distinguish claim into

Quotidex.

to

to Expreſsed and Implyed; for which ſee *infra*, & *Co. ſuper Lit.* 251. *b. Terms ley: Plow:* 359. *Lit: ſect:* 442. *Lit: ſect:* 419, 420.

Continuall claim.

And continuall Claim is a frequent Claim, or a Claim made once every year and day at the leaſt, unto ſome land or other thing, by which means the Entry, or property of him that hath right is preſerved, and a miſchief prevented: So that this doth nothing differ from Claim, but that Claim is but once only, and continuall Claim is and muſt be re-itterated and renewed once in every year at the leaſt, for in their effects and operations they both agree for the moſt part, *Lit: ſect:* 414. 429.

And note that by Claim in moſt caſes of land is underſtood a Claim with an Entry into ſome part of the land, or at leaſt a neer approach thereunto: for a Claim is ſo to be made of land; *viz.* In and upon ſome part of the land, or within view of it, unleſs it be in ſpeciall caſes of fear, *&c.* and there it may be made in view or a far off, as the cauſe of fear and danger is, *Co: ſuper Lit:* 254. *a b.*

And note alſo that this Claim may be by an Action brought, as if the Diſſeiſee bring an Aſſiſe, this is a Claim for lands: And if the Goods of a Villain be diſtrained before the Lord ſeiſe them, the Lord may have a Replevin, and by the bringing of this Action as by a Claim, the property of the Goods is veſted in the Lord, *Co: ſuper Lit:* 263. *a.*

The effects and operations of this claim. As to Lands.

The effect and operation of the Claim is divers, and he that doth make it hath therby great advantge, for by it in ſome caſes he ſhall avoid a diſſent of lands, and therby in ſome other caſes, he ſhall have his Title which otherwiſe would be loſt; and therfore ſuch Claims in judgment of Law amount to an Entry in Law, and will preſerve the right of Entry to him that maketh it, notwithſtanding there be any Diſſeiſons, Diſcontinuances, Remitters, or Diſſents by any Diſſeiſor, Intrudor, Abator, *&c.* or their Feoffee or Donee, within the year and day: As where a man hath Right and Title to enter into

into any Lands or Tenements, whereof another is seised in fee, or fee-tail; As if I be disseised, or my Tenant for life or years make a Feoffment in fee, whereby he do forfeit his land, and I having Title to enter do make continuall Claim (z) I claim the land within the year and day before the death of the Disseisor, or the Feoffee; In this case I or my Heir if I dye may enter notwithstanding the Dissent. (a) But if the Disseisor dye seised, his Heir within age, and by office the King is intituled unto the Wardship of him; in this case I cannot enter upon the King, but must have other remedy, *Lit: cap: Continuall Claim in toto.* (a) *Fitz continuall Claim* 1. 5 *Ed:* 4. 4.

And they both do defeat the Estate unjustly gained, and put the party that claimeth in possession so, that if the other occupy the thing, after he may have either an Assise against him, or an Action of Trespass, or forcible Entry, as if he were in the actuall possession of it; For such a Claim being an Entry in Law, is as strong and as forcible as an Entry in Deed, and that as well in the hands of one that hath the land by title, as by wrong, and therfore such an Entry in Law will avoid a Warranty. But yet this continuall Claim of the Disseisee shall vest the possession and seison in him only for his own advantage, and not his disadvantage: And therfore if he bring an Assise, and hanging the Assise, he make his continuall claim otherwise: or by the bringing of the Writ which doth amount to a continuall Claim in Law, this shall not abate the Assise, but he shall recover damages from the beginning: And as often as he which hath right of Entry making such Claim, and the other doth continue the occupation so often he doth wrong and disseisons to him, and so many Actions of Trespass he may have, and recover his costs and damages; or may have an Action upon the Statute of 5 *R.* 2. *cap.* 7. In which case he shall recover damages for the first wrongfull Entry, but not for the mean profits: or may have an Action on the Statute of 8 *H:* 6. *cap:* 9. In which case without any Regress he shall recover trebble damages as well for the mean occupation as for the first Entry, *Cos: super Lit:* 253, 254. 11 *H:* 6. 51. *Lit: sect:* 430, 431. *Cos: super Lit:* 263. *a. Lit: sect:* 430. *Cos: super Lit:* 257.

This

This Claim doth sometimes also produce a Forfeiture of Estate, for an Estate may be forfeited by Claim in two sorts. Either Expressed; As if Tenant for life will in Court of Record claim fee, or if Lessee for years be ousted, and he being an Assise *de libero tenemento*: or Implyed; as if in a Writ of Right brought against him, he will take upon him to joyn the Mise upon the meer Right, which none but Tenant in Fee-simple ought to do: So if Lessee for years loose the land in a *Per cipe*, and bring a Writ of Error, for Error in Process, this is a forfeiture by Claim implyed, *Coo super Lit.* 251. *b. Fitz. Judgment* 237. *Fines* 120. 15 *Ed.* 4. 29. 2 *H.* 6. 9. 16 *Ass.* p. 16. *How an Estate may be forfeited by Claim.*

By the claim of Goods the property is altered and removed from one to another; As if my Villain have Goods, which by Law are mine; now after I have made my Claim to them, and seised some part of them, the property shall be sayd to be in me: So if the Wardship of a body belong to me, and I by words claim the Ward being present, though I lay no hands on him, yet by this he shall be sayed to be seised. And so in other cases where claim is necessary, by the Claim the forfeiture of the Goods is prevented; *vide infra. Fitz. Replevin* 43. 9 *H.* 6. 25. 42 *Ed.* 3. 18. *Coo super Lit.* 118. 6. *As to Goods and chattels.*

If two Lords of two severall Villages or Mannors have waste or fields adjoyning together parcell of their Mannors; And there is no inclosure or separation between them, but the bounds and circuits of each Mannor are known, and there is in that waste or field a Common because of Neighbourhood, for the Tenants of both Mannors; In this case the Lords and Tenants of either Mannor may inclose their own, and divide themselves from the other side, and so make an end of their inner-commoning without their consent, although their side inclosed be the greatest part, *Coo.* 4. 38, 39 9. 113. 7. 5. *8. Where and in what case others may inclose one against another, and where not.*

In cases where the owners of the land have been used in a place to inclose their own land in the field, and to relinquish and waive their Common in the rest of the field, and have kept out the Commoners, so that they have not taken any

Common

Common in the incloſed ground, there every man may incloſe his land at his pleaſure: but where the reſt of the Commoners have been uſed to take their Common and put in their Cattell in ſuch incloſed grounds, notwithſtanding the Incloſure from harveſt till ſowing time; in this caſe no man may incloſe, although he would waive his Common in the field beſides: And yet if in ſuch a caſe there be an ancient Incloſure taken out of the field held alwaies in ſeverall, this may be kept incloſed alwaies, *Co.* 7. 5.

If two men have inter-common, the one in the ground of another, they may by agreement incloſe and ſeclude one another; but one of them alone cannot incloſe and ſeclude the other without his agreement, although he waive and refuſe his Common in the ground of the other; neither when the one hath incloſed, may the other incloſe without mutuall conſent: Alſo the owners of the Soil and the Commoners altogether by an unanimous agreement may incloſe any Commons whatſoever, *Co.* 7. 5 *Brow. Common* 47.

If the Lord make a Feoffment of parcell of his Waſt, it ſeems the Feoffee may incloſe it; and that this is a kind of Improvement of the Lord; but then it muſt be in caſe where an Approvement is lawfull: So if a Lord have a great Moor and infeoff another, of a hundred acres of the North-ſide therof, the Feoffee may incloſe it, or the Lord may incloſe the reſidue, *Fitz. Garanty de Charters* 31. *Dyer* 372. *p.* 10.

If one have an ancient ſleight for Cattellin a field upon his own land wheron he hath been uſed to keep them, and to drive out Cattell of other men that come within it; It ſeems in this caſe he may incloſe this Sleight. *Per Juſt. Ions 6. Car. at Glouceſter Aſſiſes.*

If the Lord have Common in the Soil of the Tenant held of him, the Tenant in this caſe may incloſe a part of his own Soil, ſo as he leave ſufficient, by the Statute of Improvement, although it ſpeak only of Lords, *Brow. Commons* 22.

In

Where and in what case a Claym or Entry is requisite, where not.

In all cases where a Right or Title of Entry is come to any man, and nothing doth hinder but he may enter into it, or make his claime to it, there he must soe do before he shall be sayd to be in actuall possession of it, or before he can grant it over: But where the party that hath right is in possession already, or where an entry or claime, cannot be made, *Contra.* As if a man disseise me of my Land, or I make a feoffment in Fee of Land in possession, upon condition, and the Condition is broken: or my Tenant in Fee-simple do Alien in Mortmaine: or my Tenant for life, do make a Feoffment in Fee, (in both which last cases he doth forfeit his Estate) now in all these cases, I must either make an actuall entry upon the Disseisor, Feoffee, and Tenant; or I must make my clayme to the Land (which is *tant amount*) before the Law will adjudge me to be in actuall possession: And the same Law is where one doth grant an Advowson, Rent, Common, Reversion, or any such like thing which doth lye in grant, upon condition, and after the condition is broken: now in this case also the Grantor must make his claime to this thing before it shall be sayd to be in him. But if a Feoffment be made on a Collaterall condition, and the Feoffee make a Lease to the Feoffor, and after the condition is broken; in this and such like cases where the party hath it in possession, he need not make any entry or clayme. *Litt. Sect.* 436. *Co.* 11. 157.

To Lands.

If a Tenant in tayle make a Feoffment and discontinue the Estate tayle and then dye, in this case, the issue of the tenant in tayle must claime, if he will prevent the inconvenience of a discent, for after a dying seised of the Feoffee, the issue cannot enter, but is put to his Formedon; *Vide Discontinuance. See Litt. Sect. Discontinuance.*

If a man seised of Land in the right of his Wife and make a Feoffement in Fee on condition, and the Husband dyeth, and the Condition is broken; and the Heyre enter, as he must, in this case the Wife need not claime nor enter to bring

her Eſtate to her for the Law doth veſt it in her without any claime. *Co. ſuper Litt.* 202. *a. Co.* 8. 43: 44.

Infants, Feme-Coverts, perſons *de non ſane memory*, beyond the Sea, or in Priſon, whiles they ſo continue, need not make any entry or claime. *Vide Infra.*

If a Fine be levyed of my Land, in this caſe if I will prevent the Barre, I muſt make my claime to this Land within five years after the Proclamations had, made or certified, or elſe I am barred of my Land for ever: For which, See *Fines. Stat.* 4. *H.* 7. *cap.* 24.

To goods.

If a Lord have right to the Goods of his tenant, becauſe he is villaine, he muſt clayme or ſeiſe the Goods, ere he ſhall be ſayd to have the propertye: if I have right to the Wardſhip of a Body, I muſt lay hands on him, or claime him, ere I ſhall be ſayd to be ſeiſed of him. So if my Goods be taken as wayffes, or eſtray, or wreck, in this caſe, I muſt claime them within a year and a day of the ſeiſure, or elſe I ſhall looſe them for ever. *Co: ſuper Litt.* 118. *b. Co.* 5: 107.

Within what time ſuch claim ſhall be made, & ſuch claime is good being made within the time. where not. To Lands.

After a Right or title of entry acrewed, it is good policy to make a mans claime or entry as ſoon as he can. For if a Fine be levyed of anothers Land according to the Statute of 4 *H.* 7. (as moſt Fines are at this day) he that hath right muſt enter or make his clayme within five yeares after his right or title acrewed; or elſe he is barred, not only of his right of entry, but of his right to the Land for ever. But if the Fine be a Fine at Common Law, and not with Proclamations, in that caſe he that hath right muſt make his clayme within a yeare and a day after the Fine levyed, or elſe he is barred for ever. *See Fines. Co.* 9. 105. *Dyer* 3: 72, 224. *Co.* 5. 107: 8. 101.

If

If a Judgement were had in a Writ of Right and execution thereupon, and another man hath right to the Land, now he must have made his claime within a yeare and a day of the Judgement, or else he is barred for ever. *Co.* 5. 107. 8. 101.

If I be disseised of my Land, and thereby put to a Right of entry: now in this case, by the Common Law, I must make my claime or my entry within a yeare and a day, (The day wherein the clayme was made being accounted one) of the disseison, or else if it happen the disseisor dye seised in the interim: I am barred of my Right of Entry, so if one abate, or intrude into my Land. *Litt. Sect.* 421. 426.

So also if I make a Feoffment in fee or condition, and the condition being broken, so as I have title to reenter, I must enter within the yeare and day, else if the Feoffee dye seised within that time my title of entry is gone, and I am put to my Action to recover the Land. But now by the Statute of 32. *H.* 8. *cap.* 33. in case of Disseison: a Disseisor must be in five yeares quiet possession before his dying seised can hurt the Disseisor: and then it may, and therefore after that time the Disseisor must make his continuall clayme: but the Law for Abators and intrudors, and the Feoffee of a Disseisor is, as it was before. *Co. Super Litt.* 283. *Plo.* 47.

But if I make my clayme, and after the Disseisor, or Feoffee, *&c.* of the Disseisor dye seised, this will not hurt me. Also if it happen that the Disseisor, *&c.* do not dye in forty years after the Disseison. If I make my claime before his Death a yeare and a day, and he dye within the yeare, this doth prevent the mischeife of his dying seised. *Litt. Sect.* 427.

If a Tenant alien his Land in Mortmaine, the Lord if he will take advantage of the Forfeiture, must make his claime or entry within a yeare and a day after the Alienation, otherwise he is barred of his entry and Action for ever. *Dyer* 25.

Continuall claime must be made once every yeare: and once every yeare doth suffice what ever happen. And therefore, if he that hath right maketh claime, and the Tenant dyeth within the yeare and the day, this claime, though it be but once made shall preserve the entry of him that maketh the claime: And if the Ancestor or Predecessor clayme, and the Disseisor dye, and then the Ancestor or predecessor dyeth, now his Heyre or Successor may enter. But if the Ancestor or Predecessor make a continuall claime, and dyeth, and the sonne or successor make no continuall claime, and within the yeare and day after the claime made by the Ancestor, the Disseisor dyeth, this shall take away the entry of the sonne or successor, for that the discent was cast in his time. *Coo. super Litt.* 250. 251. 22 *H.* 6. 37. 15. *Ed.* 4. 22.

9 *Estovers.* This word doth signifie nourishment or maintenance, & is sometimes used for that sustenance that a man taken for felony is to have forth of his lands & goods for himself and his family during his imprisonment: And sometimes for an allowance of meat or cloth. But most commonly it is used for certain allowances of wood to be taken forth of another mans wood: And it is most properly where a man hath right to cut & take housboot, hay-boot, and plow-boot to expend and use in and upon his house and tenement in the wood of another man. And this is either Certain (*i*) so many loads, or the like: or Incertain, so much as he shall spend in such a house, or the like. Also it is Appendant, or in Gross. *Westm.* 2. *cap.* 15. *Terms of the Law. F. N. B.* 181. 28 *H.* 8. 28.

To goods. If my goods be seised as Wayfes, or estray, or wreck; In this case I must clayme them within a yeare and a day of the seising of them first, or else I shall loose them; but the Lord is not bound to this time for the goods of his villaine, nor for the body of his Ward. *Coo.* 5: 107.

By what persons such clayms The party himselfe that hath right either immediate or remote, may and must in most cases make his clayme or entry to

to the Land; and this he may doe in perſon, or by his Servant or Deputy, for *Qui per alterum facit, per ſeipſum facit.* And therefore if the Maſter ſay to his Servant, that he dares not come to the Land, or any part of it, *&c.* and that he dareth goe no neerer then ſuch a place, and command him to goe thither, and make his claym, and he do ſo, this is good, though the ſervant do not feare at all. *Litt. ſect.* 432, 433. *& Co. ſuper Cro. & fol.* 245. *a.*

may be, or ſhall be made, and when ſuch claym is good by ſuch perſons, & where not.

If an Infant or any man of full age have any right of entry into any Lands, any ſtranger in the name, and to the uſe of the Infant, or man of full age may enter into the Lands, and this regularly ſhall veſt the Lands in them without any commandement precedent, or aſſent ſubſequent. *Omnis enim ratihibitio retrotrahitur & mandato æquiperatur.* But in caſe of a Fine, a ſtranger without authority preſent, or ſubſequent agreement, cannot make a clayme to avoyd. And in all caſes where one hath a right or title of Entry that is in ward, his Guardian in Chivalry or Socage may enter for him. *Fitz. Releaſe* 28. 7 *Edw.* 3. 39. 10 *H.* 7. 12. *Co.* 9. 106. *a. & ſuper Litt. f.* 245. *a.*

If the caſe be ſo with a man that he dare not, being forbidden by authority to go abroad, or cannot being ſick, and not able to goe to the Land; If in this caſe he command his ſervant to make a claym for him, and the ſervant is afraid of beating, mayming, or death, and goeth as neer the Land as he dareth, and there doth make clayme for his Maſter, this is good, and will ſuffice; for *Impotentia excuſat legem*: But if the Maſter in that caſe were in health, and might goe to part of the Land himſelfe, ſuch a claym by his ſervant will not avail him. *Litt. ſect.* 434. *To Lands.*

Alſo in ſome caſes he that hath right, and cannot enter, yet may make this claym: As he in Reverſion, after an eſtate for yeares (and as ſome hold after an eſtate for life,) by Statute Marchant, Staple, or *Elegit*, may enter to make a clayme to

prevent

prevent a defcent, or to avoyd a Collaterall warranty? But none but fuch as have right or title of entry can make this continuall claym. *Coo. fuper Litt.* 250. *b.* 251. *b.*

If a Fine be levyed of my Land, any man may enter, or make claym for me and to my uſe to avoyd this Fine, by authority precedent from me; and without authority alſo, if I doe afterwards agree to it within the five years, but not otherwiſe.

A Guardian for Education, or in Socage may enter or make clayme in the name of the Infant that hath right without any commandement precedent, or aſſent ſubſequent, in reſpect of the privity is between him and the Infant.

The Chapter in caſe of a Deane and Chapter, nor Cominalty in caſe of a Mayor and Cominalty in the vacancy of the Deane or Mayor cannot make any claym, for they have not ability nor capacity to ſue or be ſued, and entry and continuall claym muſt alwayes purſue the Action. *Coo. ſup. Lit.* 263. *b.*

To goods. The party himſelfe that hath right to the Goods or Chattells, or his Deputy or Servant, or any other in his behalfe by his precedent appointment, or aſſent ſubſequent, may claym or ſeize goods that he hath right unto, and it ſhall be good; for ſuch perſons may claym Land: *a fortiori* then, Goods. *Vide ſupra.*

In what place ſuch claim ſhall be made, and when it is well done in ſuch place or not.

He that is to make any claym or entry into Lands, if he be not afraid, is to goe to the Land, or ſome part of it: and if by his entry or claym he be to deveſt any eſtate that is in another, he muſt enter into ſome part of the Land; but if it be only to bring him into actuall poſſeſſion, and not to deveſt any eſtate in another, he may doe it in view; but if he dare not come to, nor in view of the land, he muſt come as neer it as he dare, and make his claym there. 9 *H.* 4, 5. 21 *H.* 6. 51. *Coo. ſuper Litt.* 252. 254.

If

If a man have cauſe to enter into any Lands or Tenements which are in divers villages in one County, if he make his entry into the Land within one Village in the name of all the reſt hee hath right to enter into, within all the Villages of that County, this is good for all the reſt: But if it be in divers Counties, he muſt make divers Entries: But if three ſeverall men diſſeiſe me of three ſeverall acres (though in the ſame County): Or if one man diſſeiſe me of 3. acres, & letteth it to three ſeverall men for life: or one diſſeiſe me of one acre at one time, and another acre at another time, in all theſe caſes my entry muſt be ſeverall, elſe it will ſerve only for ſo much as I enter into: But if I infeoff another of one acre of ground upon condition, and after I infeoff him of another in the ſame County on condition, and both conditions are broken, an entry into one in the name of both is not ſufficient; but an entry into one part in the name of all ſubject to one condition is good, although there be divers parcells in divers Towns. And according to this pattern (as it ſeems) a clayme muſt be made. 7 *Aſſ.* 18. 12 *Ed.* 4. 10. 36 *H.* 6. 27. *Dyer* 337. 12 *H.* 7. 25. *To Lands.*

But if it be ſo that the party in poſſeſſion do lye in wait, or have threatned to kill, beate, or mayme the party that hath right if he come upon the Land, ſo that he is in feare of his life, and he doth not dare to go into any part of the Lands; there he may come as neer it, within the view of it as he dare, and claim it, and this is good enough. *Litt. ſect.* 421.

If one have cauſe to clayme or ſeize the body of a man or woman-child for his Ward, it muſt be in his preſence by words, or elſe by laying hands upon him: But the Lord may claim his Villains goods in any place where he findes them: and ſo may any man in any other caſe. 3 *H.* 4. 15. *Fitz. Barr.* 217. *Dalt. & St. fol.* 239. *To goods.*

If a man have right or title to enter into any Lands or Tenements whereof another is ſeiſed in fee, or in Fee-tayle, if he *where the continuall claim of him which hath right or title ſhall avoid a deſcent. where not.*

he which hath title to enter makes continuall claym to the Lands or Tenements before the dying seised of him which holdeth them, then albeit such Tenant dyeth thereof seised, and the Lands do discend to his Heyr, yet he that hath made this claym, or his Heyr if he dye enter into the same Lands, and the force of the discent is hereby avoyded. *Litt. sect.* 414. 415.

As if I be disseised, or my Tenant for life alien in fee, and I make continuall claym to the Lands in the life of the Disseisor, or Alienee, if after the Disseisor or Alienee dye seised, and the land discend to his Heyre, yet I may enter upon the possession of the Heyr and avoyd this discent: so if the Disseisor, or Feoffee, *&c.* of the Disseisor disseised, yet my right of entry by this claym is saved.

Where the claim of one shall availe another, where not.

If there be Tenant for life, the Remaynder for life, the Remaynder in fee, and the Tenant for life alien in fee, and he in remainder for life maketh continuall claym before the dying seised of the Alienee, and after the Alienee dye seised, and after he in remainder for life dye before any entry by him made: now in this case he in remainder in fee shall have benefit by the claym of the Tenant for life, and he may enter upon the Heyr of Alienee, and so may he in Reversion also; And if two Joynt-tenants be disseised, and one of them doe make continuall claym, and dyeth, the survivor shall have the benefit of this claym: But if the Tenant for life doth make continuall claym, this will not avayle him in the remainder, unlesse the Disseisor die in the life time of the Tenant for life. *Litt. sect.* 416. *& Coo. super Cro.*

The claym of the Lord shall availe the Tenant that is a Copyholder, so likewise shall the claym of the Copy-holder availe the Lord: So the claim of him in Reversion or remainder shall availe the particular Tenant, and the claim of the particular Tenant availe him in remainder or reversion: For which see more in *Finch. Plow.* 359.

It

Non-claim. Ou Laches de claim, ou non claim serra prejudice ou barre: ou nemy.

It is where one hath omitted, or neglected to make his claim in the time and manner the Law appointed him, then this may be shewed or pleaded against him, to barr him of the thing he doth challenge, or would have. *Stat de 34. Ed: 3. 16. Crompt: Jur. 124.*

If an Infant be disseised, and the disseisor during the time of the Infancy dye seised, this will not prejudice the Infant, although he made not his claim in all that time, but he may enter when he comes to Age: So if a Fine be levied of his Land during his minority, and the proclamations and five years be passed, and in all this time, he hath made no entry, nor claim, this will not hurt him; for he shall have five years after he come to Age to make his claim. *Vide Finch. Ceo: 8. 100. & Litt: Sect: 402.* *Al Infant.*

If there be Tenant in tayl, the Remainder in Fee, and the Tenant in tayl levy a Fine with proclimations, he in the Remainder dye, his Heir within Age; and after the Tenant in tayl doth dye without Issue, so that the title doth accrew to the Infant, and five years incurr, and yet he is within Age: now in this case he shall not be hurt by his non-claim in these five years, for he shall have five years after he come to his ful age. *Dyer. 133. a.*

Feme Covert.

If a man be disseised of Land he hath in the right of his Wife, and the disseisor dye during the Coverture, and no claim is made by the Husband; now in this case the non-claim of the Husband shall not prejudice the Wife, though it do barr him; And if a Fine be levyed of any Land which is the Land of a Feme Covert, within the Seat: of 4 *Hi: 7.* in this case though the Husband make no claim during the Coverture, yet this shall not hurt the Wife, but she shall have five years to make her claim or entry after the death of her Husband: But if the Wife whiles she was sole (if she were of full Age) were disseised, and after take a Husband that doth not make his claim or entry, but suffer a discent; now this laches of her Husband shall prejudice her, and barr her of entry after his death. *Ceo: 100. 9 Hi: 7. 24. 2 Ed. 4 25. 7 Ed. 4: 7. Litt: Sect: 403. 404. 30 Hi: 6. 28.*

Home de non ſane memori.

If a man *de non ſane memori*, that hath not intelligence and reaſon, be diſſeiſed, have any right or title to enter into Land, and do not make his claim, but ſuffer a dying ſeiſed, if all this be during the time of his diſtemper, this laches of his ſhall not hurt him at all. *See Non ſane memori. Coo.* 8. 100.

Home en priſon.

If a man be Impriſoned, and he be diſſeiſed, and the diſſeiſor dyeth ſeiſed, during the time the diſſeiſee is in priſon, whereby the Tenements diſcend to the Heir of the diſſeiſor, this diſcent, or his non-claim will not hurt the diſſeiſee which is in priſon: But if he were at large at the time of the diſſeiſon, or at any time after, before, or at the time of the dying ſeiſed of the diſſeiſor, here his non-claim wil barr him: *Plow.* 360. *Coo: ſuper Litt:* 259 *a.* 9 *H:* 7. 24.

Home ultra le meere.

If a man be out of the Realm, in the Kings ſervice, for the buſineſs of the Realm, or otherwiſe, if ſuch a one be diſſeiſed when he is beyond the Seas, and the diſſeiſor dyeth ſeiſed, the diſſeiſee being ſtil out of the Realm, his laches of entry here ſhall not prejudice him, neither ſhall his diſcent grieve him: But if he were *infra quatuor maria* at the time of the diſſeiſon, or at any time after, before, or at the time of the diſcent, *contra Litt.* 9. *Sect:* 439. 440.

Al ouers.

If a Biſhop, Parſon, Vicar, Prebend, or Abbot dye, and during the Vacancy, one enter into any of the Land belonging to the Biſhoprick, &c. and claim it to him and his Heirs, and dye ſeiſed of that Eſtate, and it diſcend to his Heir during the Vacancy: now this diſcent and laches wil not hurt, but the Succeſſor may enter notwithſtanding. So if a uſurpation be had to a charge in time of Vacation, this ſhal not prejudice the ſucceſſor to put him out of poſſeſſion, but that at the next avoidance he ſhall preſent. *Litt: Sect:* 443. *Coot ſuper eod.*

Diſclaimer.

It is where a man doth not challenge, but deny that which is his: or it is a plea containing an expreſs denyal, or refuſal. And this is ſometimes in the Tenancy, ſometimes in the Seigniory, ſometimes in the Blood, ſometimes of Goods.

Goods. As where the Lord diſtraineth his Tenant, and he ſueth a Replevin, and the Lord avoweth the taking of it, by reaſon that he holdeth of him, if the Tenant in this caſe ſay that he diſclaimeth to hold of him; this is called a *Diſclaimer*. And hereupon the Lord may bring a Writ of right *ſur Diſclaimer*, and if it be found againſt the Tenant, he looſeth his Land for ever, if the diſclaimer be in a Court of Record, elſe he is to be amerced for it only. So if a *Precipe* be brought againſt two men for Land, and one of the Tenants diſclaimeth, and ſaith that he is not Tenant thereof, nor doth claim any thing therein, for the manner of diſclaim is ſuch. *Nihil habet nec habere clamat in terra illa, nec die impetrationis brevis originalis prædict: habuit nec clamavit ſed aliquid in terra illa habere de advocat, & diſclamat*, now by this he looſeth his part of the Land, and the other Tenant ſhall have the whole. And if there be but one Tenant, & he do ſo diſclaim, the Writ ſhall abate, and the Demandant may enter into the Land preſently, whether he have right or not. And in this caſe the Tenant hath no remedy by Writ of error, to avoid his own diſclaimer. 13 *H:* 7. 27. 16 *H:* 7. 1. *Weſtm:* 2. *cap:* 2. *Co:* 3. 26. *Fitz: N: B* 150. 13 *H* 7. 27. *Co:* 8. 62.

Deterres.

Right of Diſclaimer.

Alſo the Lord may diſclaim of his Seigniory, and in this caſe if he do ſo in Court of Record, the Seigniory is extinct and the Tenant ſhall hold of the Lord next paramount the Lord that did ſo diſclaim by the ſervices he held before. *Litt: Sect:* 146.

Alſo we may diſclaim in the blood, as in caſe where a *Nuper obiit* is brought by one Coparcener againſt another, the Tenant may claim by purchaſe, and diſclaim in the blood: and it ſeems if this be found againſt him, he looſeth the benefit of the blood and diſcent. *F: N: B:* 197. 9.

Of Blood.

Alſo one may diſclaim his own goods: As if a man be Indicted that he did feloniouſly ſteal the goods of another, where in truth they are his own proper Goods, and the Goods are brought in Court, and ſet before him, and being demanded what he ſaith to them, he doth diſclaime them; now hereby he hath loſt them to the King, as Goods confiſcate, although he be afterwards acquitted of the

Of Goods.

Fellony. *Fitz. Corone* 355. *Stanf. fol.* 186. *a.*

Of Estates. Also there is a disclaimer of Estates, (which see more of in Wayver.) As if Lands be given to Husband & Wife in Fee, or in tayl, and the Husband dyeth: now the Wife cannot by any verbal wayver, or disclaimer in the Country. As if before any entrie made, she saith she doth altogether wave, and disclaim the said Estate, and will never take, nor accept thereof, yet the Freehold doth remain in her, and she may enter when she pleaseth: So a Charter of Feoffament was made to four, and seison delivered to three, in the name of all; and the fourth when he seeth the deed, saith, he will not have, nor accept it, and disclaimeth; yet the Freehold is in him, and he hath as much to do with the Land, as the rest *Coo.* 3. 26.

1 Cottage. A Cottage is a little House newly built, that hath not four acres of Land to it. And he is a Cottager that doth dwel in such a house.

What shall be said to be a Cottage, and how the parties that erect or continue it, shall be punished. A house built since 31 *Eliz.* for habitation, or any building, or housing, made for other purpose, that since that time hath been, or shall be converted, or ordained to be used as a Cottage for habitation, or dwelling, where there is not assigned and laid to the same Cottage or building, 4 acres of ground at the least, to be accounted according to the Statute, or Ordinance *de terris mensurandis*, lying neer to the said Cottage, being his, or her own Freehold, & inheritance, that doth enter or convert the Cottage or building, and to be continually occupied, and manured therewith so long as the same Cottage shall be inhabited; is to be accounted a Cottage within this Statute: wherein these things are to be known. 1. If a man convert that building which before this Statute was one dwelling house, into two dwelling houses; these are two Cottages punishable by this Statute. 2. If one build a new house upon an old foundation in the same quantity that the old was; this is no Cottage within this Statute. 3. If one build two distinct Cottages together, the one upon the old foundation, the other upon the new; that which is built upon the old foundation is no Cottage, but that which is built upon the new foundation is a Cottage.

tage. 4. If one build a house upon an old and new foundation together, so that the entire house doth stand upon both together; this is a Cottage within this Statute. 5. If a man have a house, and one hundred acres belonging to it, and he sel the house from the Land, or the Land from the house, or sel all the land, and keep the house; this is now become a Cottage within this Statute. And if a man erect a house, and lay four acres to it, and after take it away again, now this is become a Cottage within this Statute. 6. Any house ordained or erected for habitation, or dwelling in any City, Town Corporate, Auncient Burrough, or Market-town, or for the necessary and convenient habitation of any workmen in any mineral works, Coal-mins, quarries, or delfs of stone, or slate, or in or about the making of bricks, tyle, lime, or Coals: so as the same building be not above one mile distant from the place of the same mineral, or other works, and be used only for the habitation of the said workmen, shall not be accounted a Cottage within this Statute. 7. Any house, made within a mile of the Sea, or upon the side of such part of any Navigable River, where the Admiral ought to have Jurisdiction, so long as no other person shall dwel therein but a sailer, or man of manual occupation, to, or for making, or furnishing, or victualling of any ship, or Vessel used to serve on the Sea, nor made in any Forrest, Chase, Warren, or Park, so long as no other person shall dwel therein but an underkeeper, or Warrener, for the keeping of the Deer, or other game of the Warren, nor any other house made, so long as no other person do dwel therein, but a common heardman or Shepheard for keeping the Cattel, or sheep of the Town, or a poor, lame, sick, aged, or impotent person, is not to be accounted a Cottage punishable by this Statute. 8. Any Cottage that shall be by order of the Justice of Assize, at the Assizes, or Justices of the Peace at the Quarter Sessions by their order entred in open Assizes, or at Quarter Sessions for any just cause upon complaint to them, be decreed to continue for habitation, for so long time only as by such decree they are tolerated and limited, is not to be accounted

accounted a Cottage against this Statute. 9. And therefore if the Churchwardens, and overseers of a Parish, or the greater part of them, by the leave of the Lord, or Lords of the Maunor, whereof any waste, or Common within their Parish is, or shal be parcel, and upon agreement before with him, or them, made in writing, under the hands and Seals of the said Lord and Lords, shall set up any house in a fit place, within the said waste, at the charges of the Parish for the habitation of the impotent poor of the Parish, by order of the Justices of Peace at their Quarter Sessions, is not a Cottage against this Law. 10. The forfeiture of him that shall erect any such Cottage, or convert any house into such a Cottage, is 10 l. And the forfeiture of him that shall afterward willingly uphold and maintain any such house erected, or converted is 40 s. for every moneth the same is continued, and these forfeitures are to go to the King. *Stat:* 31. *Eliz. Chap:* 7. *Resolved by the Judges,* 8 *Car: B. R. Stat:* 31. *Eliz: Per Justice Bridgman. Stat.* 43 *Eliz: chap:* 2. *Stat:* 31 *Eliz.*

2. *Inmates, or under-tenants, who they are; And how they shall be punished, redressed, or tollerated,*

Inmates be those that are admitted to dwell for their money, joyntly within another man, though in several rooms of his Mansion house, passing in and out at one door, and being not able to maintain themselves. *Kitch:* 45. *Stat:* 31 *Eliz:* 2. *chap:* 7.

There must not be an Inmate, or more Families, or Households then one, dwelling or inhabiting in any one Cottage erected, placed, or suffered; wherein these things are to be known. *Kitch:* 45. 1. If one demise part of his house, in which he doth dwel to a Gentleman that doth not keep his Table there, but goeth to Victualling houses for his Victuals, and yet he hath certain rooms in the house; this is not an Inmate. *Kitch:* 45.

2. If one keep his Daughter that is married, and her husband, or his Son, and his Wife, by Covenant or otherwise, and he doth find them, and they have some rooms in his house; these are not to be accounted Inmates: neither shall they have Common. But if these live in one Cottage, and they part the house between them, and dyet themselves severally, it seems they are Inmates. *Kitch:* 45.

3 If

3 If one have a house, and he let certain rooms of it to another to dwel in with him, he is to to be accounted an Inmate, and yet he shall not have common in the Lords waste, and in the fields, except he be of ability, for if he be a man of ability, he shall not be said to be an Inmate in any case. But if one take one into his house to Table, or sojourn with him, and let him certain rooms, he is not to be accounted an Inmate, neither shall he have Common. *Kitch* 45.

4 If the inheritor of a house demise a certain parcel of his House in which he doth dwel, & sever it from the other part, so that there are several doors into the high street, it is now as two houses, and is not to be accounted an Inmate, but he shall not have common. But if there be but one door out into the street for both the Families, then he that is taken in, is to be accounted an Inmate. *Stat:* 43. *Eliz: chap:* 2.

5 Inmates may be placed by the order of the Justices in their Quarter Sessions, with licence of the Lord of the Mannor, in any Cottage built upon the waste of the same Mannor for the impotent poor, by the Churchwardens, and Overseers, and they are not to be punished that do so place them.

6 It seems the Statute of 31 *Eliz:* as to Inmates, doth extend to Cities, and Towns, for it is put generally, and the Exception in the Statute doth go to the erection of Cottages, and not to Inmates, and so is the common practise.

7 The forfeiture of every owner, or occupier of any such Cottage, placing, or willingly suffering any such Inmate, or other Family then one, is ten shillings for every month any such Inmate shall so dwel in any such Cottage. And this forfeiture is to go to the Lord of the Leet where the Cottage is.

All the offences aforesaid may be heard and determined by the Justices of the Assizes, and Justices of Peace in their open Sessions, and by Lords within the Precincts of their Leets. And they may award execution for the levying of the said forfeitures as cause shall require. And as touching the forfeitures for Inmates, the Lord in his Leet may take the

Pre-

Presentment of the Jury thereof, and afterward levie the same forfeitures by distress to his own use. *Stat.* 31. *Eliz.* c. 7.

Force.

It is an offence by which unlawful violence is used to persons or things. And this is either implied, as in every Trespass, Rescous, and Disseisin, there is a force implied in Law, or it is actual with weapons, number of persons, &c. which always carrieth some fearful shew, or matter of terror with it. The actual force also is either simple, when it is joyned with no other crime, as entry into Lands only; or compound, when it is mixt with some other fact, which of it self is criminal: as if any by force enter into anothers possession, and kill a man, or ravish a Woman there, &c. *Co. Sup. per Lit.* 16. *West. Symb: part* 292.

Quotup'ex.

2. Forcible entrie.

A forcible entry is a violent and actual entry into any Lands, Houses, &c. or taking of any distress by any person weaponed, whether he offer violence, or fear of hurt to any there, or furiously drive out any of the possession thereof. And sometimes it is taken for a Writ grounded upon the Statute.

3. Forcible deteining of possession.

A forcible deteiner, is a violent act of resistance by a strong hand of men weaponed with harnass, or other action of fear in the same place, or elsewhere, by which the lawful entry of Justices, or others is barred or hindred.

4. What shall be said a forcible entry into, or holding of Land, and what not. And what is a justifiable, and a lawful holding of possession.

For the better understanding of this point, it must be known, that by the Common Law, any man whose entrie was lawful, might have entred into Lands and Tenements with force and Arms, and so might have kept and detained them. And therefore at this day if a man enter into Land, with force, or multitude of people, where his entry is lawful, he is not punishable by action, at the common Law. But now by the Statutes of 5. *R:* 2. *chap:* 7. 15. *R:* 2. *chap:* 2. and 8. *H:* 6. *chap:* 9. it is provided that none shall enter into any Lands, Tenements, &c. but where entrie is given at the common Law, and then in a mild and peaceable manner. And that none shall enter into, or hold a possession of Lands, &c. with a strong hand, and with force; And if any do so, one or more Justices of the Peace may take the Sheriff, and *Posse Comitatus* with him, and if they find any such thing, the partie there, & the force continuing, they may suppress, & remove

1. In respect of the persons by whom, or from whom the possession is taken, or held.

it,

and send the offenders to Goale, there to abide till they be fined to the King, and if the parties be gone, they may enquire of it by a Jury, and certifie it to the Sessions, and there the party may be indicted. Also the Justices may restore the party outed to his possession againe. But for the further explication of these Statutes, and the better understanding of these matters, these things are to be knowne: As touching the persons by or from whom the possession is taken or held.

1. That one person alone may commit, or make a forcible entry or detainer, if so be hee do it with offensive weapons, or do use turbulent behaviour, and to the affray of others.

2 An Infant of the age of 18 years by his own act may commit a forcible entrie or detainer, & so he may though he be under eighteen. But if an Infant command another to enter or hold Land with force to his use, the Infant shall not be punished for this offence, for the commandement is voyd.

3. A woman covert by her owne act may commit a forcible entrie or detainer, and shee may be imprisoned for it. but she may not be fined for this or any other offence, where her Husband is not made a party.

4 If divers do come in a company to make a forcible entry, and one of them alone doth use the violence in entry or detainer, in this case all of them are guilty of the force. And where divers doe come to enter into lands, *&c.* where their entry is not lawfull, and all of them but one do enter and demean themselves peaceably, and one onely doth enter with force, or after entry made doth use violence, this is a forcible entry in them all, albeit the force be against their will; for where divers come in one company to one place to do an unlawfull act, the act of one of them, shall be said to be the act of them all that are present, and they shall be said to be principall doers, albeit they stand by and do nothing. And so also it seemeth to be where some of them do come without any evill intent if they come together; or if they come after, and be aiding and countenancing to the offenders. If a forcible entry be made by three or more, then it is a Ryot, and the next Justice of Peace (if there be no former enquiry thereof) ought within one moneth to enquire thereof as of a Ryot;

upon paine to forfeit either of them an hundred pound: But it may be punished upon this Statute notwithstanding as a forcible deteyner, &c. Divers do enter with force to the use of *A.* who is not then present with them, but doth after agree thereunto, this after-agreement albeit it make *A.* a Disseisor, yet it doth not make him an offender within these Statutes: And so it seems if *A.* do counsell, consent, or agree to, before or after such an entry, that this is not punishable within these statutes. And it seems a forcible entry cannot be adjudged against a man without an actuall entry be made by him, or at least that hee be present: But if *A.* that shall command or counsell others thereunto, shall also be present at the time of the entry, although he do nothing, yet he is now punishable by these Statutes.

6 The King cannot be put out of possession of his freehold: And therefore he can bring no action upon the Statute of 8 *H.*6. nor any other Action which might prove him out of possession of the land. And therefore if his termor be ousted, he cannot have a Bill of Indictment upon this Statute, but he must have an Information of Intrusion in the Exchequer. And yet in this case upon complaint to the Justices of the Peace, they may, and ought to remove the Force, and upon view record it, and commit the offenders to prison, and fine them: And after the force removed, the Kings Tenant may presently if he can re-enter in a peaceable manner. But if a forcible entry or deteyner shall be made upon any other mans Lessee for years, Tenant at will, or upon a Copy-holder, whether it be by a stranger, or by the Lessor, or by the Lord, the Justices of Peace may safely upon view thereof by the Statute of 15 *R.* 2. remove the Force, and commit to prison the parties, and fine them, *&c.* and then the Lessee for years or Copy-holder may presently re-enter, if peaceably they can do so, and so may have his possession againe. But whether in these cases the Justices of Peace may make restitution, and set them into their possessions again, hath been much doubted, but is now in the Stat. of 21 *Jac.* setled. *Statutes* 5. *R.* 2. *cap.* 7, 15; *R.* 2. *cap.* 2, 8 *H.* 6. *cap.* 9, *Laws Just.* p. 145, 146, 147. *Dalt. Just.* p. 41, 171. *Cor. super Litt.* 257. *Preston de Peace* 34, 35, 36, 37. & 10

& 10 *H.* 7. 12. 15 *H.* 7. 12. 2 *H.* 7. 16. *Litt. sect.* 431. 18 *Ed.* 4. 4. 19 *H.* 6. 31. 6 *H.* 7. 1. *Co.* 9. 72. 11. 61. 5. 91.

2 As touching the nature of the thing whereof the possession is taken or held. A forcible deteiner or entry may be made of Rent or Common as well as of land; For one may distrain with force for Rent, and this doth countervaile an entry with force. And a Commoner may be by force expelled or kept out of his Common. And a man may keep his Beasts by force in another mans ground where hee hath no Common; And therfore if a man hath a Rent or common out of another mans Land; and coming to distrayn for his Rent, or to use his Common, he is so forcibly resisted by the Tenant of the Land, that he cannot, or dares not either to distrain for it, or to take the benefit of his Common; this is a holding with force in the Tenant, and punishable by these Statutes. And so it is if the Tenant shall forestall the way with force and armes, or shall threaten him that hath the Rent or Common, so that he dareth not to come to distrain for his Rent, or take his Common: And so it is if a man shall distrain for his Rent, and the Tenant of the Land shall make Rescous with force and armes: And in these cases of Rent and Common, the Justices of the Peace upon complaint to them made may remove such force, and upon view record it, and punish the offenders; but of these things they can award no Restitution, for this is to be made of houses and lands only. 39 *Ass. Plow.* 4.

2 In respect of the nature of the thing whereof the possession is taken or held.

If there be three Joynt-tenants of Land out of which there is a Rent going, and on a Distress taken, one of them doth make a Rescous by force; in this case they be all Disseisors, but one of them only shall be imprisoned.

3 As touching the matter and manner of doing it. The actuall and expresse force only is that which is forbidden by these Statutes: And therefore every force punishable by these Statutes must be either *manu forti*, as with apparant violence in deed or word offered to the person of another, as threatning speeches, turbulent behaviour, or actuall violence, or else that they be furnished with some offensive or defensive weapons by them not usually born, as with Swords, Bucklers, Pikes, Javelins, Bills, Clubs, Pitchforks, Staves, Halberts,

3 In respect of the matter or manner of doing it.

Bows & Arrows, Croſs-bows, Guns, Harneſs, or by caſting of ſtones, or blocks, powring of hot coals, ſcalding water, or lead, or with any other thing wherwith one man may hurt the perſon of another: Or it muſt be *multitudine*, *viz.* with company more then uſual y they have attending on them: And the Law doth properly call it a multitude, when there be three or more in one company; but the Judges are not ſtinted by the number.

If therefore one or more come with Bows, Bills, Guns, or other weapons more then uſually they wear, to a ground or houſe, and enter without the diſturbance of any; this is an entry by force, for it is intended they would have uſed force if they had been reſiſted.

Much more if being ſo entred, he or they, ſhall there offer violence or feare of harme to the perſon of another that is in poſſeſſion thereof; and moſt of all, if he or they ſhall forcibly and furiouſly expell and drive another out of ſuch his poſſeſſion. And if one ſhall enter peaceably (the Doore being open, or only latched) and after he is in the houſe, he ſhall forcibly put another out of his poſſeſſion. And ſo it is, if he or they ſhall enter peaceably, and after their entrie ſhall offer apparant violence, threatning, or feare of harme to the perſon of any that is in poſſeſſion, to the intent to get him out, and to make him to leave the poſſeſſion, though they do not hereby put him out of poſſeſſion, much more if they do get poſſeſſion hereby. And if a man do enter peaceably into a houſe, and after doth bring into the ſame more weapons then he and his ordinary family do commonly & uſually wear (beſides thoſe weapons that he doth find in the houſe, whereof he muſt make no uſe to defend his poſſeſſion) it is a forcible detayning of poſſeſſion: And if he or they that have entred peaceably, ſhall after uſe words to any in poſſeſſion to this effect, as to ſay, they will hold or keep it though they dye for it, or in ſpight of the other, or ſuch like, or other threatning word, this is a forcible entry.

By words.

And if a Diſſeiſor hath entred peaceably, and being entred, ſhall preſently threaten to kill the Diſſeiſee if he reenter; it ſeemeth this is a forcible entry in the Diſſeiſor. If

If a Master enter into a house or land with a greater number of servants then usually do wait upon him, for though a man do actually use no force in his entry, yet if he come so appointed with weapon or company, that other men may be reasonably afraid, that he mindeth to make his way by force rather then he will faile of his purpose; it seemeth to be a forcible entry.

If a man enter with force into house or land, although he obtaineth not, or getteth the actuall possession thereby, yet shall he be imprisoned and fined, for this is a forcible entrie (as it seemeth) howbeit no Restitution can be made in this case. And if a Justice of *P.* shall come to the house or place that is supposed to be holden with force, and there shall find the Doores or Gates shut, and him, or those within denying him to enter, this is a detaining of possession by force, though there be no weapon shewed or used, and though there be but one person within the house; for in this case the offendor doth use the doore as a Buckler to keep the possession. And so it is, if when the Just. of P. entreth the house or ground he shall find there any persons in harnes, or otherwise armed, or having Harnes, Armour, or other weapons (not usually born by them) lying ready by them. And so it is, if the Justice of Peace shall find in the house any great number of people other then the ordinary family or company: But the having of weapons in the house that were there before, & be found there at his entry will not be adjudged a forcible detainer.

And if a man that hath peaceably entred into a house will draw men with force (*scil.* with Harnes, Guns, or other weapons) in some other house or place not farre distant, to the intent that they may be ready to assault such as shall enter upon him, this is a detainer with force. So it is if the Disseisor of a house or Land shall forestall the way of the Disseisee with force and armes, so that the Disseisee dareth not to to enter or come neer thereto for feare of death, &c. So it is if *A.* wrongfully (though peaceably) entreth into the house or land of *B.* and hath put out *B.* and shall presently threaten or say to *B.* that if he do come thither again to enter, he will kill him; this seemeth a forcible entry by *A.* And if *B.* shall

ſhall afterwards come again to make his entry, and then *A.* ſhall threaten to kill him if he enter there, this *is* a forcible detainer in *A.* And ſo alſo it ſeemeth if he threaten to maim, beate, or do any other bodily hurt to *B.* for hereupon death may enſue. But to threaten to burn the houſe, or ſpoile his goods therein (if *B.* ſhall come thither to enter againe) this it ſeemeth is no forcible entry or detainer. So to cut trees after a man hath entred peaceably, is no forcible detainer. See *infra.*

But if a man (whoſe entry is lawfull) ſhall perſwade or entice them which are within the houſe to come out, and then (the door being open or ſhut by the latch only) he ſhall enter peaceably without multitude, offenſive weapons, or other violence; this entry is not forcible, but ſeemeth to be juſtifiable.

So if he ſhall enter peaceably, and then by gentle perſwaſions can ſend them out that are within the houſe, and after ſhutteth the door and keepeth them out, and afterwards he doth not hold it forcibly, nor uſeth violence or threatning ſpeeches.

So if I take a man (being out of his houſe) and then doe put or ſend into the houſe my ſervant or ſome other in peaceable manner, and do keep away the other by impriſonment of his perſon.

So if he whoſe entry is lawfull ſhall enter peaceably into the houſe (the doors being open or ſhut by the latch only) and being ſo entred, ſhall continue and abide there peaceably. And if in this caſe they which were before in poſſeſſion ſhall put or thruſt him out forcibly, this is a forcible deteiner of their parts.

And if *A.* enter upon *B.* and *B.* comes to make his Entry, and *A.* doth ſay to him, that he will not open the doors, this is no forcible deteiner.

And If *B.* enter upon *A.* that hath a leaſe of a houſe at the will of *B.* and command *A.* to goe out and leave him his poſſeſſion, and *A.* will not go out, this is no force. *Ubi factum nullum ibi fortia nulla.*

4 As

4 As touching the case.

4 In respect of the Case.

If *A.* mortgage his house to *B.* upon condition, that if *A.* shall pay to *B* such a day forty pounds, then the mortgage and feoffment to be void, and by agreement *A.* keepeth the possession untill the day of redemption, and at the day he doth not pay the forty pound, and after *B.* cometh to re-enter, and *A.* keepeth the possession by force, it seemeth this is a deteiner by force.

If the Disseisor make a gift in tayl to *B.* who keepeth the Land with force at the time when the Disseisee maketh his claym, which claim is made within the view so neer as he dareth for feare of death, battery, or other bodily hurt, if *B.* after such claime shall continue the possession with force; this is a new entry and detainer with force.

If a man enter peaceably and his entry be lawfull, and thereupon he get a lawfull possession, and continue in by the space of three years together without interruption, in this case he may hold and keep his possession with force against all others saving the Kings Officers. See it *infra.*

5 As touching the end and intent of him that doth enter or detaine the possession, and of the force that is used.

5 In respect of the end and intent of the entry and detainer.

1 It seemeth that every entry into another mans house or land which is made with force (*scil. manu forti*, or *cum multitudine*, either with apparant violence offered to the person of any other, or furnished with weapons or company which may offer feare) though it be but to cut or take away another mans Corn, Grass, or other goods, or to fell or crop wood, or to do any other like Trespass, though he do not put the party out of his possession, yet it seemeth to be a forcible entry punishable by these Statutes.

But if the entry be peaceable, and after the entry made, the parties cut or take away any corn, grass, wood, or other goods without apparant violence or force; these acts though they are accounted a disseisin with force, yet they seem not to be punishable by these Statutes: but if they shall by force or violence cut or take away any corn, grass, wood, *&c.* or shal forcibly & wrongfully carry away any other goods there being; this seemeth to be a forcible entry punishable by these Statutes.

Statutes. And so it is if a man shall distrain with force for Rent (be it due or not) for this doth countervaile an entry with force: And in these cases of Trespass only the Justice of Peace may remove the force, and punish the offenders.

If one that hath right to enter into Land, doth goe with divers in his company, and with weapons over the land, whereto he hath right to the Church, Market, or some other place, and shall not express his intent that he doth enter claiming the land, this is no entry with force.

2 The force that is used with the warrant, and in the maintenance of the Law is not punishable by these Statutes; but being used to some speciall ends and intents, is justifiable. And therefore force may be lawfully used by all the Kings Officers, Ministers, and Subjects thereunto deputed (with the help of all others to assist them when need shall require) to execute or advance Justice, or the judgements of the Law.

It is therefore a lawfull force is used for the apprehending, carrying to Gaole, and execution of offenders in Treason, Felonie, and such like great crimes.

It is a lawfull force that is used by Sheriffs and their Deputies in apprehending of men upon the Kings Writ.

It is a lawfull force that is used by Justices of Peace, to remove those unlawfull entries, or unlawfull detainings of possession which one man doth make into another mans Land, contrary to the Statutes aforesaid, and to put him againe in possession who was wrongfully disseised or expelled thereof: And it is a lawfull force that is used by Justices of Peace and other Officers charged and authorized to keep the Kings peace: And in all these cases, and to these purposes a man may enter forcibly into any house or lands, and justifie it. For if a man suspect of Treason or Felony be in his owne, or another house, and the doors be fast that a man cannot otherwise enter, in this case the party pursuing may by force break open the house to apprehend him. And so it is where one that hath hurt a man in perill of death is fled into an house. And so it is if an affray or a quarrell be moved in a house, whereby the Peace is broken, or likely to be broken.

And

And ſo it is upon a *Capias Utlagatum*, and a *Capias pro fine*, and in all caſes where the King is party, and the party to be apprehended is in a houſe, that the Sheriff cannot otherwiſe come at him; in theſe caſes the Sheriffe or other Officer may break open the houſe with force, and juſtifie it. And ſo alſo where the Sheriff hath a writ of *Habere facias ſeiſinam*, or *poſſeſſionem*, to give ſeiſin or poſſeſſion of a houſe to a man that hath recovered it; in all theſe and the like caſes they may enter into a houſe by force, and juſtifie it. But then in all or the moſt of theſe caſes, eſpecially where the party to be apprehended is in the houſe of another man, they may not break open the houſe, if they may enter without breaking it, and therefore they are to give notice, and make requeſt to the parties within the houſe, ere they do break open the doors, elſe they cannot juſtifie it. But in ordinary proceſſe, at the Suit of a common perſon, the Sheriff may not juſtifie the breaking of the parties houſe. And yet if another man will flye to my houſe, or bring his goods thither to prevent lawfull execution; in this caſe if I will not after notice and requeſt, deliver the goods or the perſon, he may juſtifie the breaking of my houſe to take them; for my houſe is my Caſtle and place of priviledg for my ſelfe, Wife, Children, Servants, and ordinary reſiants only, and not for others.

If a man diſtrain goods, and put them in a Caſtle, that when the Sheriff comes with a *Replevin*, he cannot come at them, if upon notice and requeſt they do not open and give way to the *Replevin*, he may enter with ſtrong hand, and demoliſh it if he will, if otherwiſe he cannot come at it.

And if Theeves or Robbers do come to my houſe to rob or murther me, I may defend it by force; and if I, or my ſervants kill any of them, I am excuſable.

And if a man being in his own houſe do hear that another will come to his houſe to beate him, he may call his friends and neighbours, and be armed to defend his perſon: But if a man be threatned, if he come to ſuch a place, that then he ſhall be beaten, in this caſe he may not take his friends and neighbours to aſſiſt him.

And if there be an attempt made to beat, maym, or wound me, my Wife, Father, Mother, or Children within age, or to diſſeiſe me of my land, diſpoſſeſſe me of my goods, diſturb me of my way, or water-courſe to my Mill, I may uſe ſome force to reſiſt them.

And if a man be in poſſeſſion of a houſe peaceably, and he doubteth that another (who indeed hath more right to the poſſeſſion, and may enter) will enter upon him; in this caſe he which is in poſſeſſion may defend and keep his poſſeſſion with his ordinary company, and may beat the other that doth attempt to enter upon him. But if he hire ſtrangers to ayd him, or have his own ordinary company in armour, or provided with bowes, or guns, or the like, this may make a forcible detainer contrary to the Statutes aforeſaid. And yet in caſe where a man is ſeiſed (of a lawfull eſtate or poſſeſſion) of an houſe or lands, and he or his Anceſtors, and they whoſe eſtate he hath therein have continued the poſſeſſion of the ſame peaceably by the ſpace of three whole yeares together without interruption (and his eſtate not ended) in this caſe he may hold and keep his poſſeſſion againſt all others: yea it ſeemeth if he ſhall hire ſtrangers to aid him to keep ſuch poſſeſſion, or ſhall have his company in armour, he is not puniſhable by theſe ſtatutes. But he may not reſiſt the Juſtices of Peace that ſhall come to view this: And this is by a ſpeciall proviſo in the Statute of 8 *H.* 6. which is thus: *Provided that ſuch as keepe their poſſeſſion by force after that they or their Anceſtors have continued their poſſeſſion three yeares, ſhall not be indamaged by force of that Statute.* And if now a man ſhall be indicted for ſuch his forcible holding (after three yeares ſuch quiet poſſeſſion) he may plead ſuch his lawfull and peaceable poſſeſſion by the ſpace of three yeares next before ſuch Indictment, and thereby he ſhall avoid both the Impriſonment and Fine, and alſo ſhall debarre the other party of his reſtitution: Neither may the Juſtice of Peace remove him from his poſſeſſion, though it be found by the Inquiſition taken before them, that hee held that houſe or Land by force after three years lawfull and peaceable poſſeſſion

ſion as aforeſaid: But here it ſeemeth theſe four diverſities are to be obſerved.

1 Where the party in poſſeſſion did enter peaceably, and where forcibly: For if a man entet forcibly, and after continueth his poſſeſſion peaceably by the ſpace of three yeares without interruption, yet it ſeemeth he ſhall not be aided by theſe Statutes.

2 Where the party in poſſeſſion hath continued his three years poſſeſſion peaceably, and where by force: For if after a lawfull and peaceable entry a man ſhall continue or hold his poſſeſſion by force, this is a forcible holding or detainer puniſhable by the Statute of 8 *H.* 6. And three years of ſuch poſſeſſion ſhall not aid him as it ſeemeth.

3 Where the party in poſſeſſion is in by right, and of a lawfull eſtate, and where by wrong: And therefore if a Diſſeiſor (or other perſon that cometh in by a wrongful and unlawfull title) hath continued ſuch his poſſeſſion peaceably, and by the ſpace of three yeares without interruption, it is doubted if he ſhall be aided by either of the Statutes of 8 *H.* 6. or 31 *Eliz.* But if a Diſſeiſor hath continued his poſſeſſion forcibly by the ſpace of twenty years together, yet may he be indicted upon the Statute of 8 *H.* 6. before a Juſtice of Peace of the forcible detaining of the ſame: And the ſame being found, the ſaid Juſtice of Peace is to teſeiſe the ſame, and to award reſtitution to the party ſo put out.

4 Where the party hath continued ſuch his poſſeſſion three years without interruption, and where his poſſeſſion hath been interrupted or diſcontinued: For if a man hath bin in peaceable poſſeſſion of land, *&c.* by the ſpace of 3. years, and above by a good title, and then is diſſeiſed and expelled by force, and the Diſſeiſee re-entreth peaceably, or the Diſſeiſor is thereof indicted upon the Statute of 3 *H.* 6. and the Diſſeiſee is thereupon reſtored, and in poſſeſſion accordingly; yet in theſe caſes the Diſſeiſee cannot juſtifie the detainer of the poſſeſſion of thoſe lands by force, becauſe his poſſeſſion was once interrupted: But (after ſuch interruption and re-entry or reſtitution) if he ſhall continue a peaceable poſſeſſi-

on again for three years together, then it ſeemeth he may juſtifie the deteiner of the poſſeſſion thereof by force, by vertue of this proviſo in the Statute. And if a Diſſeiſor have continued in poſſeſſion peaceably three years, and after the Diſſeiſee doth re-enter, or doth make his claim ſo neer as he dareth, and then the Diſſeiſor doth re-enter again, or continueth his poſſeſſion after ſuch claym, here the Diſſeiſor cannot juſtifie to hold the ſame with force, for by the re-entry or claim of the Diſſeiſee, the firſt diſſeiſin & poſſeſſion is removed, and the Diſſeiſor is in of a new diſſeiſin. Alſo if he that hath been a lawfull poſſeſſor of Lands by the ſpace of twenty years together, be once clearly and wholly removed from the poſſeſſion of the Land, he cannot come with force or multitude to put himſelf in poſſeſſion thereof againe, and to detain the ſame with force, becauſe his poſſeſſion was once interrupted: And if he be indicted upon the Stat. of 8 *H.* 6. for ſuch forcible entry, he ſhall not be relieved (touching the Reſtitution) by the Stat. 31 *Eliz.* for that he had not the occupation of the ſaid lands, nor had been in quiet poſſeſſion thereof by the ſpace of 3. years together next before the day of ſuch Indictment found.

§ The remedy of the party that is ſo put or kept out of his poſſeſſion. And who are Judges in caſe of a forcible entry, and what thoſe Judges may do.

The party that is thus forcibly put, or kept out of the poſſeſſion of his houſes or lands, *&c.* hath divers waies to relieve himſelf. For firſt (if he have an Eſtate for life, in tail, or in fee) he may have his Aſſiſe, or Action of Treſpaſs of forcible Entry, upon the ſtatute of 8 *H.* 6. againſt the Diſſeiſor: And therein if the Defendant be attainted of force, he ſhall fine to the King, and alſo anſwer to the Plaintiff his trebble damages and trebble coſts of Suit; And the Plaintiff alſo ſhall thereupon have a Writ of Reſtitution to reſtore him to his former Eſtate. As touching which Writ or Action, theſe things muſt be obſerved.

1. That this action (being the Suit of the party, & only for the right) is given there only where the entry of the Defendant is not lawfull; for if a man entreth with force where his Entry is lawfull, as if the Diſſeiſee ſhall enter upon the Diſſeiſor with force, he ſhall not be puniſhed by Action, and yet he

he may be indicted on the ſtatute, and ſo the other may be reſtored to the poſſeſſion, *&c.* And after this he that did enter forcibly may enter peaceably if he can, or he may have an Aſſiſe of Novel Diſſeiſin at his pleaſure: *Dalt. Juſt. p.* 17. 19 *H.* 6. 19. *F. N. B.* 248. 22 *H.* 6. 37 *Poulton de pace* 38, 8 *Ed.* 4. 9. 19.

2. He that doth bring this Action muſt have an Eſtate in fee-ſimple, in tail, or for life, at the leaſt in the Lands or Tenements entred upon, as he muſt that will maintain a Writ of Entry, upon the ſtatute of 5 *R.* 2. *ubi ingreſſus non datur per legem*: For a Tenant for tearm of years, a Copy-holder or Tenant at will, cannot maintain this Action; and yet he or him that is in Reverſion, may otherwiſe upon complaint to the Juſtice of *P.* have the like remedy that another man may have. Neither can every one that hath a Fee-ſimple bring this Action; for the King cannot bring any Action upon the ſtatute of 8 *H.* 6. or any other Action that may prove him out of poſſeſſion of the land.

3. If a man diſſeiſe me of my land with force, and I re-enter again upon him, yet I may have this Action for my damages, and it is no good plea for him to ſay, I am in poſſeſſion of the land.

4. A man may have this Writ of a Rent as well as of land.

5. If there be two Joynt-tenants or Tenants in Common of lands, and one of them doth expell and put forth the other out of poſſeſſion, out of the lands by force; he that is ſo expelled may have this Action againſt his companion, and in this caſe he ſhall have a Writ of Reſtitution to reſtore him to his former Eſtate; And yet in this caſe he that is put out cannot maintain a Writ of Entry upon the ſtatute of 5 *R.* 2. againſt his companion that put him forth; and ſuppoſe he did enter on the lands *ubi ingreſſus non datur per legem.*

6. The Writ and Declaration in this Action upon the ſtatute muſt alwaies be *vi & armis, & non illicite*, or by any other ſuch like words, for otherwiſe the Writ ſhall abate, for Proceſs of our lawry lyeth upon it. And the Declaration muſt expreſs the certainty of the lands whereupon the Defendant did make his forcible Entry, and which they be, and not ſug-

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gett that he did enter upon ſome lands in *D. F. N. B.* 249. 20 *H.* 6. 12. 20 *H.* 7. 20.

7. In this Writ the Defendant may plead not guilty, and if he do plead ſome other matter in Bar, yet he muſt in the end of the Bar traverſe the Entry with force, and the Plaintiff muſt anſwer to that ſpeciall matter alledged in the Bar, without anſwering to the traverſe of the force, and upon that ſpeciall matter the iſſue muſt be joyned and not upon the force: And if that ſpeciall matter alledged in the Bar be found by Verdict with the Defendant, he ſhall be excuſed, and the force ſhall not be enquired of; But if it be found with the Plaintiff and againſt the Defendant, then the Defendant ſhall be attainted of force, and render trebble damages and trebble coſts without enquiry of the force: As one brought an Action of forcible Entry upon the ſtatute of 8 *H.* 6. and ſuppoſed that the Defendant with force and armes, entred into a Meſſuage, *&c.* whereunto the Defendant pleaded that a ſtranger was ſeiſed of the ſame Meſſuage, *&c.* and enfeoffed him therof, by means whereof he entred peaceably without that, that he entred by force. And the Plaintiff made a Title and traverſed the Bar, and the Iſſue was found for the Plaintiff, and thereupon it was adjudged that the force ſhould not be enquired of; for ſeeing the Title is found againſt the Defendant, he ſhall not be convict of the force, as on the other ſide, if the Bar had been found for the Defendant, the force ſhould not have been enquired of; for that if the Title of the Plaintiff be not good, although the Defendant doth enter with force, the Plaintiff hath no cauſe of Action, and yet in that caſe he that doth enter with force ſhall be indicted therof, and ſhall pay a Fine to the King therfore: And if the Defendant doth enter peaceably where his Entry is not lawfull, he may plead that he did not enter *contra formam ſtatuti*, and by that means the force and the diſſeiſin ſhall be enquired of: But if he make a Title to the land by pleading in Bar, as is aforeſaid, then it ſhall be adjudged his own folly; As in a Writ of forcible Entry, when the Defendant doth plead in Bar, yet he muſt traverſe the force: So in a Preſentment of forcible Entry before the Juſtices of Peace it was found and preſented, that *A.*

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was seised of the Mannor of *B.* in his demesne as of fee, untill *C.* did enter upon the said Mannor and put him out with force and armes against the Kings Peace. And this Presentment being removed into the Kings Bench, the Process being awarded for the King against *C.* he appeared and pleaded to the force and armes and all that is against the Peace not guilty; But the Court enforced him to plead to his Entry; and then he justified his Entry by reason of a Remainder in tail to his Father of the same land, and that his Father entred and dyed seised thereof, and that he as Heir to his Father did enter. And so it is, if a man be indicted for the taking away of certain Goods by force and armes, he shall answer to the taking, and if he be found guilty of the Trespass, there shall be no enquiry made of the force and armes. 37 *H.* 6. 23. 38 *H.* 6. 1 *Pembertons de pace* 39. 19 *H.* 6 32.

8. A man brought an Action of forcible Entry against divers others upon the statute of 8 *H.* 6. and counted that they did with force and armes enter upon his land and put him out, and so declared according to the statute, whereupon they were at issue: And it was found by Verdict that some of the Defendants entred upon the land with force and armes; and did not hold it with force, and some others of them did enter peaceably into the same land and held it with force and armes; and so the Jury taxed damages severally upon both these severall points; upon which Verdict it was adjudged, that the Plaintiff should recover trebble damages against those that entred forcibly, and also should recover trebble damages against those that entred peaceably, and held with force, and the costs of his Suit: And further that the said Plaintiff should be amerced, for that he supposed that all did enter with force, which was found against him. And in like sort if two be indicted of forcible Entry, and detaining with force, and upon their Traverse it is found, that one of them entred with force, and the other detained with force, yet Restitution shall be awarded to the party put out of possession. 2. Or in the second place, if any person after an Entry made into Lands or Tenements holden with force, shall make any Feoffment or other discontinuance thereof to any Lord or other person to

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have maintenance, or to defraud the Poſſeſſor of his recovery; or if any perſon ſhall take or carry away any goods of the Poſſeſſors of the Free-hold after ſuch forcible Entry, then if the party greived, or other lawfull man will affirm that the Entry was made in ſuch forcible manner, the Chancellor of *England* may grant to the party greived a ſpeciall Aſſiſe: And if the Diſſeiſor be attainted of ſuch forcible Diſſeiſin, he ſhall be one year impriſoned, and pay to the party greived his double damages, and alſo damages for his goods. And one of the Juſtices of the one Bench or of the other, or the chief Baron of the Exchequer (if he be learned in the Law) ſhall be named in every ſuch ſpeciall Aſſiſe; And no *Superſedeas* ſhall be granted to the contrary of ſuch Aſſiſe. 3. Or in the third place, if the party grieved by ſuch forcible Entry or Detainer, will looſe the benefit of his trebble damages; he may be aided and have the aſſiſtance of the Juſtices of the Peace, and that after divers ſorts. *Stat. 4. H. 4. chap. 8. Poulton de pace* 35. *Poulton de pace* 40. *Dalt. Juſt. p.* 181. 46, 47.

1. He may purchaſe a Writ out of the Chancery, directed to the Sheriff only, or to the Sheriff and Juſtices of the Peace, and to every of them, for to remove the force. And this is upon the ſtatute of *Northampton*, 2 *Ed.* 3. *cap.* 3. The form therof ſee in *F. N. B.* 249. And this is in the nature of a Commiſſion to them, and therfore herein they proceed as Miniſters only: And hereupon they are to make Proclamation three times, according to the effect of the Writ, and then they are to enter into the place ſuſpected, or to make Inquiſition by Jury, to ſee if there be any Armour or Weapons uſed contrary to the Proclamation; And if any ſuch Armour be found, they are to ſeiſe and appriſe it to the Kings uſe, and to impriſon the Offenders. And if upon the Proclamations the parties depart in a peaceable manner, then may they not commit them to priſon. But by this Writ they have authority to remove the force only, and cannot put the party expelled into poſſeſſion again. 4. Or in the fourth place, the party greived may at the generall Seſſions of the Peace within the ſame County preſer his Bill of Indictment, upon the ſtatute of 8 *H.* 6. for ſuch forcible Entry or Detainer; which being found

found there, the Complainant shall be restored to his possession, by a Writ of Restitution granted out of the said Court to the Sheriff. 5 Or in the fifth place, as the most speedy remedy the party grieved may complain to any one or more Justices of Peace of the same County of the same force, who *ex officio*, and without any Writ may either do execution of the statute of *Northampton* as aforesaid, where he hath a Writ delivered unto him, saving that in this case he needeth not to make any Proclamation, nor to send any Certificate into the Chancery; But the Justice may go to the place where the force is, and if it be in a house, he may enter and search, and if any force of Armour or Weapon be worn or born against this statute: And if any such Offenders be found, he may commit them to Prison, and may seise and preise the Armour so found with them; And he ought to record all that which he shall do in this behalf, and thereout to send some Estreat to the Exchequer, that the King may be answered of the Armour, or of the value therof. But here again the Justice must not make any restitution to the party ousted, but must only remove the force. And concerning the Offenders so found and committed by the said Justice of Peace, it seemeth the Justice (at his discretion) may fine them, and upon payment therof or sureties found for the same, the said Justice may deliver the Offenders even as in the former statutes of 15 *R.* 2. and 8 *H.* 6. or else the said Justice may record such force and remit the Offenders, and after certifie the Record into the Kings Bench, or to the Justices of the Gaol-delivery, or to the generall Sessions of the Peace; or else the same Justice or Justices of the Peace may proceed otherwise; For every Justice of the Peace upon any complaint to him made, or upon other notice to him given of any forcible Entry into, or holding or detainer of possession of any Lands, Tenements, or other Possessions (or of any benefits or offices of the Church) contrary to these statutes, without any examining, questioning, or standing upon the right or title of either party, may and ought in convenient time (at the costs of the party grieved) to do execution of the statutes aforesaid, in this manner. *Dyer* 187. *Crow p.* 165: *Dalt. Inst. of p.* 46. 47. *Dalt. Inst. of p.* 42. 45:

1. He ought to go to the place where such force shall be.

2. He may take with him sufficient power of the County or Town by his discretion, and the Sheriff also if need be to aid him for the better execution of his business, viz. as well for the arresting of such Offenders, as also for the removing of the force, and for the conveying of them to the next Gaol.

3. He ought to arrest and remove all such Offenders as at his coming he shall see or find continuing the force, and may take away their Weapons, Harnesse and Armour, and presently cause them to be prised, and after to be answered to the King as forfeited, or the value therof. And if the doors be shut and they within the house shall deny the Justice to enter, it seemeth he may break open the house to remove the force: But if such Offenders being in the house at the coming of the Justice shall make no resistance, nor make shew of any force, then the Justice cannot arrest or remove them except upon the enquiry, a force be found. And if the house or land which is holden with force shall extend into two Counties, and the Offenders remove their force into that part of the house or land which is in the other County, when the Justice doth come, he cannot then remove the force.

Record. 4. He ought to make a Record of such force by him viewed, and this Record shall be a sufficient conviction of the Offenders, and the parties shall not be allowed to traverse it: And this Record (made out of Sessions by a particular Justice) the same Justice may keep in himself, or he may make it indented, and certifie the one part into the Kings Bench, or to leave it with the Clerk of the Peace, and the other part he may keep himself.

Imprison. 5. He ought to commit immediatly to the next Gaol all such persons as he shall find and see continuing the force at his coming to the place. The said Offenders there to remain convict by his own eye, testimony and record, untill they have paid a Fine to the King, for this sight and view of the force by the Justice (being a Judge of Record) maketh his Record matter (in the Judgment of the Law) as strong and effectual as if the Offenders had confessed the force before him, and

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(touching the restraining of Traverse) more effectuall than if the force had been found by a Jury, upon the Evidence of others. But the force must be in the presence or view of the Justice of the Peace, or else he can neither record it, nor yet commit the Offenders; For upon force found by enquiry only, (although this Presentment of the Jury be a conviction of the Offenders.) It is thought the Justice of Peace can neither fine nor send to Gaol; But however he is to remove the Offenders that be present, that so he may restore the other, and may bind the Offenders to their good behaviour: And if they be gone yet he may make his Warrant to take them and send them to Gaol, untill they have found sureties for their good behaviour.

6. The same Justices of Peace or some of them that shall see the force (as having best knowledge of the matter, and of the quantity of the offence, and having the custody of this Record) are the proper Judges over this offence; and therfore may assess the Fine upon every such Offender: But the Fine must be imposed upon every Offender severally, and not upon them joyntly; And the Justice ought to estreat the same Fine; and to send the Estreat into the Exchequer, and that from thence the Sheriff may be commanded to levy the said Fine to his Majesties use; But upon the same Fine so assessed and estreated, it seemeth the Justice is to deliver the Offenders. Also upon payment of the said Fine to the Justice, or upon sureties found by Recognizance for the payment therof, the Justice may deliver the Offenders again out of Prison at his pleasure, by some opinions: But *Quere* for that the Sheriff is accountant for all Fines, or the Justice of Peace (by some opinions) may record such force and commit the Offenders; and after certifie the Record to the Justices of Assise and Gaol-delivery, or else to the generall Sessions of the Peace, and there the Offenders may be fined, for the statute doth not say that the Fine shall be assessed by them that record the force: But rather the Justices of Peace may certifie or deliver the Record by them made, and refer the Fine and further proceedings therin to the Kings Bench; which is thought to be the safest Course. *Dalt. Inst. of pe. 44. 45. 182. Poulton de pace 35. stat. 8 H. 6:*

Fine.

Enquiry. 7. Alſo the Juſtice of Peace notwithſtanding his own view of the force, may and ought in ſome good Town or place neer where the force was, to enquire by a ſufficient Jury of the ſame County, to be returned by the Sheriff as well of thoſe which made ſuch forcible Entry, as of thoſe which made ſuch forcecible detainer, wherin theſe things muſt be obſerved.

1. That one Juſtice of Peace alone out of the Seſſions may make an Inquiry, wheras otherwiſe to hold a Seſſions there muſt be two at the leaſt, and one of them muſt be of the *Quorum*.

2. This Inquiry may be made, whether the Offenders be preſent of gone at the coming of the Juſtice of Peace.

3. This Inquiry may be made albeit the Juſtice of Peace go not to ſee the place where the force is.

4. This Inquiry muſt be made by men of good Eſtate; and therfore the Juſtice of Peace is to ſend his Warrant to the Sheriff, to command him in the Kings behalf, to cauſe to come before him 24. ſufficient and indifferent perſons, neer about the place where the force is ſuppoſed to be, and every of them ſo returned muſt have forty ſhillings by the year at the leaſt in Lands and Tenements: And the Sheriff is to return iſſues upon every man ſo ſummoned; the firſt day twenty ſhillings, the ſecond day forty ſhillings, and the third day fifty ſhillings, and at every day after double. And upon default of appearance of the Iurors the Juſtice may grant an *Alias*, and after that *pluries infinite* till they come: And if any Sheriff or Bayliff of Franchiſe that hath the return of ſuch Writ ſhall be negligent, he ſhall forfeit twenty pounds; But if ſuch Iurors have not forty ſhillings land *per annum*, yet their preſentment of ſuch force is good for the King, ſo as the Offenders ſhall fine therfore to the King: And if the Sheriff return ſmaller iſſues upon the Enquirors then the ſtatute doth appoint, yet the party indicted ſhall not impeach the Inquiry therof, but theſe defaults in the Sheriff for not returning ſufficient men may be puniſhed by the Juſtice of Peace, who may heare and determine theſe offences by Bill or Indictment, wherin ſhall go the like Proceſs, as againſt men indicted for Treſpaſs.

It

5. It is conveuient upon such inquiry, that the Evidence be given openly to the Iury; to the intent it may appear to the Iustices of Peace or Court, whether there be reasonable cause to stay Restitution or not, after the Indictment found.

6. If upon such Enquiry, such forcible Entry, or such forcible holding or detainer shall be found by the Oathes of the Enquirors, then the said Iustice of peace shall reseise the Lands and Tenements so entred upon or holden, and therof put the party in possession again, which in such sort was put or holden out: As touching which point of Restitution, it is considerable.

Restitution. who may have it.

1. What persons may make Restitution; and herein it must be known: Any one, or more Iustices of peace (before whom the same force shall be found) may himselfe put the party in possession again; Or he may make his Precept (under his own Seale alone) to the Sheriff to do it, and therupon he may do it: But no other Iustice of peace hath any authority (by the statute) to grant or award Restitution, but only he or they before whom the force is found by Inquisition. Nay, the Iustices of *Oyer* and *Terminer*, nor the Iustices of Gaol-delivery cannot grant Restitution, nor the Iustices of the peace at their generall Sessions of the peace, cannot grant this Restitution except the Indictment were found before them; And yet the Iustices of the Kings Bench (in regard of their supream authority in all cases of the Crown) either upon Certificate to them made by the Iustice of peace (before whom such force was found) of the presentment of such force: or if the said Presentment or Indictment shall be removed before them by *Certiorari*, in both these cases the Iustices of the Kings Bench may award Restitution. But neither the Iustice of the Kings Bench (nor any other besides him or them that made the Enquiry) can personally seiſure the party but only by way of precept to the Sheriff. And to do this worth (if need be) the Sheriff may take the power of the County; and therfore if the Sheriff upon a precept from the Iustice of Peace, or upon a Writ of a Restitution (from the Sessions &c.) shall return that he cannot make Restitution for Resistance, &c. he shall be amerced for making such a Return, because he may

And how.

To whom it shall be pleaded.

may take power enough to assist him; And if it be found by such Enquiry, that any such forcible Entry or Detainer is made, the Iustice of Peace may break open the house by force to re-seise the same, and to put the party so put out into possession again; And so may the Sheriff do having the Iustice of Peace his Warrant.

2. It is considerable to whom Restitution must be made, wherein these things are to be known: That this Restitution must be made to him that is put out, and to none other; and therfore if the Father be put out by force, and dyeth, his Heir shall not have Restitution: So if Lessee for years be put out with force, and dye, his Executors shall not be restored to the possession: And yet here the Iustices may imprison and fine the Offenders; And if after the death of the Father a stranger abateth, and entreth into his land by force, before the Heir hath gotten actuall possession indeed, the Heir shall not have Restitution, because he had but a possession in Law descended unto him. *Dalt. Inst. of P.* 185, 44.

If the Disseisee put the Disseisor out with force, the Disseisor shall be restored; for the Right or Title is not for the most part materiall: And yet, in this case upon a Traverse tendred by the Disseisee, and his Right appearing, the Iustice of Peace may stay Restitution.

Also if the disseisor be restored again, yet the disseisee may after re-enter peaceably, or have his Assise. But if the Disseisee shall enter peaceably upon the Disseisor, and so they both shall continue there together for divers dayes, and after the Disseisee doth put out the Disseisor with force, and is thereof indicted: Here it seemeth the Disseisor shall not be restored, for the Disseisors possession was avoided in quiet manner, at the first entry of the Disseisee in eye of Law.

If the Disseisee shall enter peaceably, the Disseisor and his family being abroad, and after the Disseisee shall keep his possession with force, the Disseisor shall not be restored by reason of the eigne title of the Disseisee, and for that he entered peaceably. But here the Disseisee shall be imprisoned and fined for keeping his possession with force.

And here note, that the being of a mens Wife, Children,

or

or Servants in the house, or upon the land, doe preserve his possession; but his Cattell being upon his ground, &c. do not preserve his possession.

Also when two are in possession of a house, &c. and the one claimeth by one title, and the other by another title, here the Law will adjudg him to be in possession who hath the best right to the possession: So that if *A.* shall wrongfully enter upon *B.* & they both shall continue in the house, and after *B.* shall put out *A.* with force, *A.* shall not be restored; for *A.* never gained any possession by his entry.

If two Joint-tenants or Tenants in Common be, and one of them do forcibly put out the other out of his possession, he that is so expelled may have an Action upon the Statute, and thereupon have a writ of Restitution to restore him to his former estate. But what the Justice of Peace may do herein, *quære*, for that his entry and possession is lawfull through the whole Land in respect of his own moiety and estate.

If two Joint-tenants be put out with force, and one of them only sueth to have Restitution, in this case restitution shall be made unto him. And when it shall be made to a Copy-holder, Lessee for years, or Tenant at will. See before in *Cro. third part of his Institutes*, 242, 243. *Dalt.* 182, 183. 44, 45.

3. It is considerable where and how Restitution shall be granted: And for this it must be known.

1. No restitution shall be made but where the forcible entry or detainer is first found by Inquisition: And the Inquisition or Indictment must be sufficient also; for no Restitution can be granted upon an insufficient Indictment or Inquisition. And that the Indictment may be sufficient, there must be in it, and found by the Inquisition the putting out (by express words) for another man [illegible] upon me and not put me out, and then there needeth no restitution to be made by the Justices: And this putting out is to be understood only of house or land, [illegible] Common, Advowson, or such like.

Indictment.

what is necessary to make it good in law.

2. The Indictment must express the quality of the thing entred into, &c. *scil.* whether it be a Messuage, Cottage, Meadow,

Meadow, Pasture, Wood, or Land arable; for if the Indictment be *intraverunt in tenement, &c.* it is void for incertainty, for tenement may refer to either.

3 The Indictment must have these words, *viz. adhuc extratenent*: so that these words, *expulerunt & adhuc extratenent*, and for lack of either of these to Restitution can be awarded.

4 Also one of these words, *manu forti*, or *cum multitudine* seem to be materiall, unless they be implyed by reciting the Statute of 8 *H.* 6. and concluding *contra formam statuti predict.* or by some other words. And if a man be restored upon an insufficient Indictment taken before the Justices of Peace, and this be removed into the Kings Bench, the Court there will cause the party to be restored, that before was put out by the Justice of Peace.

Also if Errour or Insufficiency be in the Indictment taken before the Justices of Peace, and yet Restitution is awarded by them, any two of the Justices present at the taking of the Indictment may grant a *Supersedeas* (at another Sessions, or out of Sessions) at the request of the party to the Sheriff to stay the same restitution, if it be not don before. But no other Justice of Peace (besides those who were present at the taking and finding of the said Indictment) can grant a *Supersedeas*, if the Indictment be found at a speciall Sessions; but if it be found at a Quarter Sessions, *quere*: A man is indicted that he entred with force, and held with force; and upon the Traverse it is found that he entred with force, but not that he held with force; yet this Indictment seemeth good enough, and the party shall be restored: So two are indicted of a forcible entry and detainer, and upon the Traverse it is found that one entred with force, and the other held or detained with force, yet the party shall be restored.

Supersedeas. By whom may be granted.

2 This Restitution is to be made onely where a man is put out or holden out, &c. of house or land, and is not to be granted of a Rent, Common, Advowson, or such like.

3 The Justice of Peace may make Restitution notwithstanding any offer of Traverse: But yet upon Traverse tendred, the safest way for the Justice of peace is, to deliver or certifie

certifie the presentment into the Kings Bench, and so to refer the further proceedings therein to them.

4 If it be found by one Enquest that *A.* put me out by force, and by another enquest that I did put out *A.* by force, either of us may pray to have Restitution against the other: but he that is first restored is in the worst case, for the other may have restitution afterwards, and then he that had Restitution first is without remedy by the hands of the Justice of Peace, but he may re-enter peaceably if he can, or have his action. *Severall Indictments.*

5 If it be found by one Enquest that *A* did put me out by force, and by another Enquest taken at the same Sessions that *B* did put me out by force, I may choose upon whether of these Indictments I will be restored. And if I have Restitution against *A.* and this be returned, I cannot have Restitution upon the other. But if (upon the writ of Restitution) it be not returned that I have Restitution, then I may afterwards have restitution against *B.* upon the other verdict, if *B.* hath re-entred upon the first restitution made to me.

6 *A.* is disseised or put out with force by *B.* and after *B.* is put out with force by *C.* and all this is found by one and the same Inquisition, in this case *B.* may have restitution against *C.* for *B.* hath more right to the possession then *C.* and then may *A.* have restitution against *B.* But upon this Inquisition, if *A.* have Restitution first, then *B.* shall not have any Restitution, otherwise if these had been found by severall Inquisitions.

4 In the next place it is considerable in what cases, and for what causes the Justices of Peace may stay the granting of restitution; for albeit the party indicted for a force, shall not be heard nor suffered to give his Title in evidence to excuse himself and save his fine (which he shall endure, be his right never so good) yet as to the Restitution (which the Complainant will demand if the force be found) the Defend. shall be heard to disprove the title of the Complainant, or what he can say otherwise for the stay of restitution; for in this case, *Causes of stay of granting Restitution.*

and for this purpose hee may alleadge any of these three things.

1. His quiet possession for three years: For there shall be no Restitution awarded, in case where the party indicted hath been in quiet possession by the space of three whole years together, next before the day of the Indictment found, if his estate be not ended: And this the party may alledge, and upon this, Restitution shall be stayed by the Justice of Peace untill it be tryed, if the other party will deny or traverse the same.

2. He may deliver to the Justice of Peace, or Court *a Certiorari*, and this is a *Supersedeas* to them: And therefore if a man have committed such a force, and be in doubt that he shall be indicted thereof before the Justices of the Peace upon the Statute of 8 *H.* 6. and that thereupon Restitution will be awarded against him, he may have a *Certiorari* out of the Kings Bench ready, and when the Bill of Indictment is found, hee may presently deliver to the Justice of Peace or Court, and this is a *Supersedeas* to them, for hereupon the Indictment shall be removed into the Kings Bench. And although the Indictment be found after the Taste of the *Certiorari* it is not materiall: But if a *Certiorari* come to remove an Indictment taken before the Justices of Peace in the Countrey, and the party will not sue to remove it, but doth suffer it to lie still, some think the Justices of Peace may proceed to grant Restitution: But it seems that the Justices *ex Officio* are to send the Indictment away, because they are commanded so by the Writ, and this Writ is a *Supersedeas* of it self: And after Restitution made by the Justices of the Peace, if the other party doth remove the Indictment by a *Certiorari* of a more eigo date then is the Indictment, the Justice of the Kings Bench may award Restitution back againe; for upon the matter the Justice of Peace had no power to make Restitution, for that the *Certiorari* had relation from the date. After Restitution granted from the Sessions, and delivered to the Sheriff, the other party having a *Certiorari* delivereth it also to the Sheriff after the Sessions, the Sheriff shall not surcease thereupon (for he hath no authority to allow thereof)

of): But if the *Certiorari* were delivered to any Justice of Peace, he may thereupon grant a *Superſedeas* to the Sheriff. And if Reſtitution were made by the Sheriff before the ſayd *Superſedeas* came to his hands, then the other party ſhall have reſtitution back again in the Kings Bench upon the Indictment removed thither.

3. He may tender a Traverſe (But ſome doubt whether he may be admitted to a Traverſe before the ſame Juſtice of Peace) But this tender of a Traverſe (to an indictment of a forcible entry upon the Statute of 8 *H.* 6.) is no *Superſedeas* but in diſcretion, ſo as the Juſtice of Peace or Court may grant, or ſtay the Reſtitution at their diſcretion, according as the truth of the right or title ſhall appeare to them, and ſo is the uſe of the Kings Bench: Or elſe the Juſtices of the Peace before whom the Indictment was found, may after Traverſe tendred, certifie or deliver the Indictment into the Kings Bench, and ſo referr the further proceeding therein to them. But if the party indicted ſhall tender a Travers preſently, whereupon Reſtitution is ſtayed; and after he ſhall not purſue his Travers with effect (but diſcontinueth it) and after doth tender another Traverſe upon Reſtitution prayed at another time, the Juſtice of Peace or Court ſhall do well to proceed to grant Reſtitution notwithſtanding ſuch Travers tendred: And it is the courſe in the Kings Bench that he that tendreth the Traverſe there (upon ſuch an Indictment) ſhall bear all the charges of the tryall, and not the King, nor he at whoſe Suit the Indictment was found: And the ſame reaſon ſeemeth upon an Indictment Traverſd before the Juſtices of Peace.

4. He may ſhew the inſufficiency of the Indictment for the cauſes before alleadged.

5. And ſome have thought he may plead the inſufficiency of any of the Jurors, *ſcil.* for not having forty ſhillings Land *per annum*. And ſome think that the Juſtices of Peace ought not to ſtay Reſtitution, ſave only in caſe where three years quiet poſſeſſion is alleadged, or by removing the Reſord, *Ideo quere.*

The Mayors and other Officers of Cities having Franchise, have like authority therein as Justices of Peace have within their County. 2 *H.6. cap.9.*

And if the Justices of Peace be negligent in their Offices upon these Statutes, they may be punished in the Starre-Chamber.

An

An Alphabeticall TABLE.

A

ABility to sue or not to sue, in what respect it is. 223

Acceptance, what it is. pag. 1

Where and in what case it is a Barr. 2

Acceptance by the issue in tayle a good Bar. 3

Acceptance by the Successor of a Bishop, a goood barre. 4

Acceptance by a Feme after the death of a Baron. Ibid.

Acceptance by a Lord of a Mannor or by him in remainder or reversion. 5

Acceptance by an Heyre. Ibid.

Acceptance by an Infant, at full age. Ibid.

Acceptance where it doth not barr. Ibid.

Acceptance by issue in tayle where it barreth not. Ibid.

Acceptance by a Successor where it barreth not. Ibid.

Acceptance by Feme where it doth not bar. 6

Acceptance by a Lord of a Manner where it barreth not. Ibid.

Acceptance by him in remainder or reversion where it barreth not. 7

Acceptance by an Heire, in what case it doth bar him. Ibid.

Acceptence of another thing collaterall, where it barreth, and where it barreth not. Ibid.

1 To a Feme after the death of her Husband.

2 To a Feoffor or Lessor.

3 To an Infant.

4 To

4 To the Lord of a Manour.
5 To an Obligee upon a Judgment.
Advowson what it is. 9
Advowsons their sorts. ibid.
Admission what it is. 18
Assize of darrein pre∫entment, where it lyeth. 21
Avoydance what, and where. 44
Avoydance the next granted, the nature of it. 46
Agi∫tment or Pawnage. 52
Authority, the nature of it. ibid.
Authority, what shall be said to be good, what not. 54.55
Authority, when well pursued. 58
Authority, when revokable. 59
Affiance or Es∫pou∫als, quotuplex. 83
Acts, how considerable. 121
Acts ∫ubstantiall and circum∫tantiall. 123
Agent and Patient. 123
Acts per∫onall how to be done. ibid.
Act of God. 124
Act of Law. 124
Acts { 1 Executed. 2 Executory. ibid.
Age prayed. 125
Age where allowable. ibid.
Ages their diver∫ity. 127
Agreement, what. 128
Assent and di∫agreement. 129
Agreement and di∫agreement its operation. 130
Agreement when good, and when not. ibid.
Agreement or assent where it is ne∫ssary. 134
Arbitrement. 136
Arbitrators. ibid.
Arbitrement and accord how they do differ. 136
Arbitrements, the fruit and effect of it. 137
Arbitrement gives no title to free-hold. 138
Arbitrators their duty. 140
Arbitrable matters, what. 141
Arbitrement, the incidents to it. 142

Arbi-

Arbitrement, where and in what cases it is void. ibid.
Arbitrement, the common fault of it: 143
Arbitrement incertaine, 143. and not good many wayes, 144. for that it is not satisfactory, 143. for that it is made uppon part only; 146. for want of meanes to attaine the thing, 146. not good for the unreasonablenesse of it, 147. for the impossibility, for that it is against Law. 148
Award, who may submit to it, and who not. 139
Award satisfactory. 149
Award reasonable 151
Award, how it shall be taken by exposition. 152
How it shall be performed. ibid.
Arbitrement where a good plea. 153
How pleadable. ibid.
Accord and concord. 154
Accord, what shall be so. 154
Accord, its quality. ibid.
Accord, its defaults. 155,156
Apportionment, what it is. 157
Apportionable, what things are, what not. 158,159,160
Annuity apportioned. 162
Apportionment how to be made, where not. 162,163
Attaynt what it is. 169
Attaint, the tryall and proceedings.
Attaynt, who may have it, and against whom. 170
Where it lyeth, and where not. 171
Attaynt, what plea is in it. 172
Attorney, who he is. 173
His warrant. ibid.
Attorney private, Who. 175
Attorney, where and in what case he may be had, 173
Attorney, what may be done by him. 174
What cannot be done by him. 175
His duty and office. ibid.
Private and publique. 176
His power and authority. 177
Audita querela, the process of it, and against whom it lyeth, 178, 129. in what cases it lyeth. 178,179

Audita

Audita querela, *to prevent a Judgment or Statute.* 181
Anceſtor. 192
Anceſtrall action. 193
Aile, Beſaile, and Coſonage. 193
Ancient Demeſne. 194
Avowry, 196. *upon whom it ſhall be made.* 197
Avowry, where there is ſeiſin of more Rent then ought to be. 197
Aſſiſe, 213. de non procedendis in Aſſiſis. *ibid.*
Accedas ad Curiam. 214

B.

Blancijs de ferendis, 214
Bargaine, what ſhall be ſaid to make it good. 246
Barke. 209
Baſtard. 222
Bargain and Sale, 185, *upon a Return, upon a Certificate, upon a Deed*, 187. *upon a Jointure*, 186, 187: *upon a Court Roll*, 188 *upon a Voucher, where and in what caſe, and upon a Record*, 188, 189, 190.
Burrough Engliſh. 195
Baſtardy. 203
Baſtard, what iſſue ſhall be ſo called, 203. *what not*, ibid. & 204.
Baſtard eigne, & mulier. 205
Baſtard, what he is capable of, and what not. 206
Baſtard, what acts he may doe, what not. ibid.
Baſtardy puniſhable, 207.
Beadle who he is, 208
Benevolence. ibid.
Bayliement. 260
Banckrupt, 267. *Proceedings againſt him*, 268. *Commiſſioners, their duty and power*, ibid. *Reſolutions upon the Statute of Banckrupt.* 269, 270, 271
Bigamie: 121

C.

Communication. 249
Contract extinct and determined. 257

Contract apportioned. 258
Contract of another where it shall charge a man. 259
Chattells, 272, 273. *What things shall be reputed so*, 274. *Executor, what chattels he shall have*, 275, 276, 277, 278. *what he shall not have.* 279
Cession what it is. 45
Church, by what meanes, and how many wayes it may be void. 45
Commendam, what and where. 46
Consolidation and Union, what. 51
Commission, of what kinds they are, and of what things, and when by the Common Law, and when by the Statute. 60, 61
Commission of Sewers, what. 62
Commissions, by whom granted, and by whom to be granted. 63
Commissioners, their power and duty, 64. *their faults and punishment.* 66
Commission when determined, and when not. 66
Commission when determined 1 by a new one. 2 By a Supersedeas. 3 By death, or demise of the King. 4 By default of adjournment. 5 By acceptance of Dignity. 6 By commandement or mandat, 67, 68, 69
Commandement when good, when not good, 69. *to excuse or not excuse*, 70, 71
Commandement of a Judge or Officer, when it excuseth. 72
Countermand by marriage in what cases, in what not. 113
Causa matrimonij prælocuti. 117
Cui in vita. 117
Capacity { *Politicall.* / *Naturall.* } 123
Compulsion its effect. 125
Counter-plea of age. 128
Compromise what it is. 137
Countermand of submission. 139
Compromise how expounded. 139
Condition quotuplex. 161
Condition how apportioned. 162
Common, of what it is. 262
Common how apportioned.

Condition. 165
Contribution 166. *where to be had, whereno,* 182, 183.
Contributionis faciendâ 167.
Certificat of Assise 213
Contra formam, *Feoffmenti* 217
Contra formam Collationis 217
Comitatu commisso 218
Custode admittendo & amovendo 218
Capacity or ability 219
Corporation sole. 221
Cable. 224
Castellane, ibidem
Castle Guard quid ibid.
Causes and effects 227
Certainty and incertainty 226
Where it is requisite 1 *in record* 2 *in Verdict.* 3. *in Writings,* 227. *when it may be help by averment or election* 228, 229.
Charge by what means it may be upon Land. 230, 232, 232, 233 234. *by what means it may be defeated and the Land discharged,* 235, 236. *by matter ex post facto.* 236. *by Remitter* 237, 238. *by other matter.* 239. *how it may be discharged,* 239.
Charters what they are, 241. *to whom they belong* 242.
Contracts 244. *their Exposition* 248
Contract per Parol 249
Collation what it is, and why 15
Chattells where they do belong to the Heire 281
Chose en Action, Quotuplex. 289. *the nature of them,* ibid. *what shall be reputed things of that nature,* 290. *where they are grantable* 291. *by the King, and by a common person.*
Chose en Action suspended 292. *who shall have them* 293.
Common quotuplex 294. 1 *Appendant:* 2 *Appurtenant.* 3 *Ingross.* 4 Pur cause det. Vicinage. 295. *Tithe se Common how it may be made,* ibid.
Customs for Common, 299
Commoners their remedy 304, 305
Chymin quotuplex, 306
Cymin

Chyminage its nature, 309. *remedy for it*, 312. 313
Clayme quotuplex, 316 *continuall* 317: *the effects of it*: 317. 318
Claime how it may forfeit an estate and where 319
Claime where and in what cases it is requisite 321. *to Lands*. ibidem *to goods* 322.
Clayme within what time it ought to be made, 322-323. *by what persons it ought to be made*, 324.325. *in what places it shall be made and when it is said well to be made* 326. *to Lands*, *to Goods*: 327.
Clayme continuall where it ought to be to avoyd a discent, 327: *where it shall availe a third person* 328. 1 *An Infant*, 2 *Feme covert*, 3. home en prison.
Cottage what shall be so called, 328. 329
Contract of marriage. 84
Coverture 86:
Child who shall be reputed the Father of it, 207

D.

Disclamer 326. *of blood*, *and of goods*, 327: *of estates of a Cottage*, 328.
Donature what, *and the nature thereof*. 12
Dismes: 27.
Domo reparanda, 218
Disabilities, *and how long they continue*, 223.
Dedi what it implyeth, 243
Debt where demandable, 165
Dispensation 82. *where it may be had*. 53. 78
Divorce 117: *the causes of it* 118. 119. *the effect and fruit of it*. 119
Disagreement what act shall make it what not 131.132.
Deprivation 45
Disproportion what is so called, 51
Detinue 260: *for what it lyeth*. ibid. 262. *where it lyeth not* 263.264,

E.

EXtinguishment where, 28
Execution apportioned, 162
Entry 1. In casu consimili. 213
2. In casu proviso. 213
3. Ad Communem legem. ibid.
4. Sine assensu Capituli. ibid.
Exoneratione secta, 218
Expensis militum levandis, ibid:
Extirpation. 218
Emblements to whom they shall appertaine, 282,283,284,285.
remedy to recover them, 287.288.
Estovers. 324

F.

FAit the Assise of it. 210
Formedon quid & quotuplex.
Fine capiendo pro terris.
Freehold what things are requisite to make it passe what not. 245
246
Feme Covert 86
Feme sole 111
Faculties. 78
Force quotuplex, 332
Forcible entry. ibid:
Forcible deteyner. 332,337,338, 339, 340, 341, 342, 343,
344. *the remedy against it.* 348.349,350.351.

G.

G.

Gleab what it it is. 27
Gavel-kind. 195
Gauelet: 196
Grants voyd by the incapacity of the Grantees 222
Gravi querela. 217

H.

Home capto in Withernamio. 115
Hermaphrodites. 222
Husband and Wife, when, 86. *how one person.* 87
Husband what he may Act to his wife during coverture. 88
Husband and Wife, how acts done by them shall enure. 90
Husband what things are given him by marriage. 91:92.93.
Husband what he shall have after his wifes death 93. 94. *what he shall not have.* 95,96,97,98.99.
Husband where chargeable for the duty of his wife 100. *during the Coverture and after the death of the wife.*
Husband his power alone. 101. 102.103.104.
Husband what he cannot doe. 104.105:106.107.
Husband and wife what acts they may both do. 111:112.
Husband and wife what actions they may mayntaine, and what the Husband may have alone, and joyntly with his wife. 113.
Husband and wife where joyntly to be sued. 115
Husband and wife where one of them shall answer without the other. 116
Husband and wife how they shall be charged with criminall matters joyntly, and how their acts shall be construed. 117
Home replegiando. 200.

IRon what wood may be coaled to make it.
Iusticei 115.
Iuxta placitando non 115
Inquirendo 217
Infants and Minors. 222
Ideots. ibi.
Inclosure who may make it. 209
Impropriation what. 50
Jurisdictio, quid, quotuplex. 72
Institution when and what it is. 10
Induction what. ibid.
Juris Utrum. 22
Jus Patronatus. 23
Inclosure, improvement with the power of the Lord of the soyle, 306 307.
Inmates who 330. 331.
Indowment what. 22

K

KING where he shall present, 26

L

LAps how the time is to be accounted. 26
Laps what it is and the effects of it. 24
Licence how to be taken. 75
What things may be done by it what not. 74
By faculty, or by other Licences. 75
Licence when pleadable and how, 76
Licence where it is necessary, where not. 77
Licence who may give it, who not. 78
Licence in what manner to be made. 79.

Licence

Lycence when to be purſued, when not. 80

Licence { *in Law.* / *in Deed.* } 80

Licence when it is revocable, and when it is determined 81
Licentia de non reſidentia pro Clericis Regis: 216
Licentia transfretandi: 216.
Libertatibus exigendis in itinere: 115
Libertatibus allocandis, 115
Latitat. 219

M.

MAnucaptio. 115
Marriage. 83
Marriage who may controll it who not. 85
Marriage impediment. ibid.
Maſter of the faculties. 54
Mort d' anceſtor 194
Monſtraverunt 196
Mulier *who it is.* 203

N.

NOn *ability.* 219.220
Non ability *in reſpect of Crime.* 221
Non-*age where a ſuit ſhall be ſtayed for it* 126 *where not* 127
Notice where and in what caſes required. 60
Nomination. 14
Ne admittas 22
Nuper obiit 194

O.

ONerando pro rata portione: *where it lyeth and where not.* 167. 168

Occupant

Occupant 314
Office judicial and ministerial. 280
Ordinary where he shall present or collate by lapse and where not. 25

P.

Prescription to wayes. 310. 311.
Pontage quid 315
Patron what he is. 9
Parson who. 11
Parson imparsonee. 11
Parsonage or Rectory. 12
Presentation what 14. who shall have it and who not. ibid.
Presentation by the heir of the Kings Tenant when it ought to be. 15
Presentation by the King for Symony when and why 15
Presentation when the Parson is made Bishop. 15
Presentation when the Patron is allowed to whom it doth belong. 16
Presentation by the Heire in soccage. ibi.
Presentation whether it belongeth to the Pope, or no, discussed. 17
Presentation what is good, what is not good. 17
Presentations when they belong to the Lord Chauncelor, and when not. 18
Prerogative. 23
Prerogative in Title 35 36
Perinde Valere 54
Proprietary. 80
Proprietate probanda. 200

Q.

Quod ei deforceat. 217
Quare obstruxit. 219
Quare impedit, 20. where it lyeth, and where it lyeth not:

Quare

Quare non admissit. 24
Quid pro quo. 247

P.

Pathedges & Deliverance, 201. where it lyeth, and where not. 16
Pone per tales. 214
Ponendo in Ballivum. 214
Perambulatione facienda. 214
Precipe, 116. in Capite, ibid. non intro mittendo, 216. non mercando victualia, non procedendo in Assisam. 216
Pontibus reparandis. 218
Persons deformed. 222
Pactum Nudum.
Promise where good, 250, 251. Conditionall, 252. where it is single for want of a consideration, 254, 255. for other causes. 226

R.

RAtionabili parte bonorum. 217
Retorno habendo. 201
Retorn irreplegiable. 201
Recaption where it lyeth. 202
Replevin, 197, 198, 199
Right to an Advowson. 19
Rector defined. 11
Resignation, what. 45

S.

SYmony, *what it is.* 47
Symmonaicall contract, what is so called. ibid.
Second deliverance. 201
Sales of goods and chattels, where good. 246
Subsidies and Fifteens. 241

T.

TYthes *of what kindes,* 27
Tythes, their nature. 28

Tythes,

Tythes, who shall pay them, and who not, and in what manner they are to be paid and set forth. 29, 30
Tythes of what things, and in what cases they ought to be paid, and where not, and how. 30, 31, 32, 33, 34
Tythes of whom to be recovered, where two or more seeme to be chargeable. 35
Tythes, where payable by prescription, where not, and how. 36, 37
Where a man shall be discharged of them. 38, 39
Where a man shall be discharged by Act of Parliament, and how that Act is to be taken. 40, 41, 42, 43, 44
Trespasse. 283, 284, 285
Taxes and Rates where. 239
Taxes for maymed Souldiers and Mariners. 239
For Prisoners. 240
For the Church. 241

V.

VEntre inspiciendo, 218
Villaynes. 221
Visaica removenda. 22
Usurpation. 23
Unity what it is. 28

W.

WIddows what benefit the Law gives them. 122
Woods remedy for wrongs committed in them. 210
Writ what it is, and how many sorts of them. 211
Writt of Entry quotuplex. 112
Warranty how apportioned. 162
Warranty 165
Warranty of Attorney publique and private. 177
Withernam. 202
Wood what may be cut and what not, and by whom 208

Wardship

Wardſhip Where it doth belong to the Father 281
Writ judicial to the Biſhop upon Recovery of an Advowſon. 21
Wife what acts ſhe may do to her Husband, what not. 89
Wife how acts done to her ſhall enure. 89
Wife where her act alone ſhall bind the Husband. 107. 108. 109
Where her act ſhall not bind. 110
Wife what ſhe ſhall have againe after divorce, and what not 120
Widdows their reſtraint. 121

FINIS.